IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION NO. 10 OF 2006
With
COMPANY PETITION NO. 9 OF 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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In re CORE HEALTHCARE LIMITED
And
In re NIRMA LIMITED

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Appearance :
Shri Saurabh Soparkar, Sr. Counsel, with
Smt. Swati Soparkar for Petitioner(s).
Shri J.A. Adeshra for Respondent(s).
Shri Y.N. Ravani for M/s. Gannon Dunkerley & Co. Ltd.
Shri G.N. Shah for M/s.Alstom Projects India Limited.
Shri Sunit S. Shah for Oman International Bank S.A.O.G.
Shri Mihir Joshi, Sr. Counsel, with
Shri Anip A. Gandhi for HDFC Bank Ltd.
Shri Mihir J. Thakore, Sr. Counsel, with
Shri Sandeep Singhi for M/s. Singhi & Company for M/s.ARCIL.
Shri Harin P. Raval, Central Government Asst. Solicitor General for the Union of India.
Shri Bharat Jani for Industrial Development Bank of India Ltd.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date of Pronouncement : 01/03/2007

COMMON C.A.V. JUDGMENT

This judgement shall dispose of Company Petition Nos.9 and 10 of 2006.

2. Company Petition No.10 of 2006 has been filed under Sections 78, 100, 391 and 393 of the Companies Act, 1956 (“the Act” for short) by the Company named Core Healthcare Limited, a company incorporated under the Act in the matter of a composite Scheme of Arrangement in the nature of compromise with the lenders and reconstruction, reorganisation of capital and demerger between Core Healthcare Limited and Nirma Limited and their respective shareholders. The petitioner-Company has prayed for the following reliefs:

> *“(a) The Modified Composite Scheme of Arrangement referred to in para-15 of this petition and being Annex. with this petition hereto, be sanctioned by this Hon'ble Court so as to be binding on all Equity Shareholders, Class 'A' Lenders and Class 'B' Lenders of the Petitioner Company and on the Petitioner Company;*
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> *(b) That the Petitioner Company do within 30 days from the date of sealing of the order cause a certified copy of the order sanctioning the Scheme of Arrangement to be*

filed with the Registrar of Companies, Gujarat, Ahmedabad for registration and upon such certified copy of the order being so delivered, the Registrar of Companies, Gujarat, Ahmedabad be directed to consolidate all relevant files, documents, records relating to the De-merged Company maintained by him with the files, documents, records of the Resulting Company.

(c) For such incidental, consequential and supplemental orders and directions may be given as may be made in the premises as to this Hon'ble Court may deem fit and proper;

(d) Costs of this petition and the order to be made thereon be provided for."

2.1. According to the petitioner-Company, the object of the petition is to obtain sanction of the Court to the composite Scheme of Arrangement in the nature of compromise with the lenders and reconstruction of Core Healthcare Limited, the petitioner demerged Company, reorganisation of capital of Nirma Limited, and demerger and transfer of undertaking (as defined in the Scheme) of Core Healthcare Limited to Nirma Limited, as modified at the meetings.

2.2 The petitioner, M/s. Core Healthcare

Limited, (hereafter referred to as “Core” for brevity) was incorporated as a public limited company on 28th August, 1986 in the name and style of Core Parenterals Limited. The name of the company was changed to Core Healthcare Limited with effect from 17th November, 1994. It is submitted by the petitioner that as per the latest audited balance sheet as on 31st March, 2004, the authorised, issued, subscribed and paid-up share capital of Core consist of the following:

Share Capital as on 31.03.2004

Authorised:

5,00,00,000 Equity Shares of Rs.10/- each	Rs.50,00,00,000
5,00,00,000 Preference Shares of Rs.10/- each	Rs.50,00,00,000
Total...	Rs.1,00,00,00,000

Issued and Subscribed Fully Paid-up:

2,67, 56,676 Equity Shares of Rs.10/- each Fully Paid-up	Rs.26,75,66,760
Add amount received on shares forfeited	Rs. 16,000

Partly Paid-up:

90,37,000 Equity Shares of Rs.10/- each Rs.8/- paid-up	Rs. 7,22,96,000
Total..	Rs.33,98,78,760

There has been no change in the issued, subscribed and paid-up capital of Core after 31st

March, 2004 till the date of filing of the petition.

2.3 The objects of Core are set out in the Memorandum of Association annexed to the petition and under the circumstances, it is not necessary to burden this judgement by referring to the main objects of the Company.

2.4. Core is a listed public limited company engaged in the business of manufacturing and selling medical and pharmaceutical products.

2.5 M/s. Nirma Limited (hereinafter referred to as “Nirma” for brevity), the Resulting Company, was incorporated under the Act as a private limited company on 25th day of February, 1980 under the name and style of Nirma Private Limited. Pursuant to the provisions of Section 43A of the Act, the company became deemed public company with effect from 1st day of July, 1989 and it came to be known as Nirma Limited. The company became full fledged public company *vide* a special Resolution passed on 8th day of November, 1993. One Nilnita Chemicals Limited was

amalgamated with Nirma under Order dated 3rd May, 1995 passed by the High Court. *Vide* another order dated 19th December, 1996 passed by this Court, the three companies, namely, Nirma Detergents Limited, Nirma Soaps & Detergents Limited and Shiva Soaps & Detergents Limited, were amalgamated with Nirma Limited. Under order dated 13th August, 2003 passed by this Court, the operating division of Nirma Industries Limited was demerged and transferred to Nirma Limited.

2.6 As per the latest audited balance sheet as on 31st March, 2005, the authorised, issued, subscribed and paid-up share capital of Nirma consist of the following:

Share Capital as on 31.03.2005

Authorised:

9,50,00,000 Equity Shares of Rs.10/- each	Rs.95,00,00,000
5,00,000 6% Redeemable non-cumulative Non-convertible Preference Shares of Rs.100/- each	Rs. 5,00,00,000
Total...	Rs.1,00,00,00,000

Issued and Subscribed:

7,94,01, 376 Equity Shares of Rs.10/- each Fully Paid-up	Rs.79,40,13,760

2,79,285	6% Redeemable non-cumulative Non-convertible Preference Shares of Rs.100/- each	Rs. 2,79,28,500
	Total....	Rs.82,19,42,260

Paid-up:

7,93,82,484	Equity Shares of Rs.10/- each Fully Paid-up	Rs.79,38,24,840
2,79,285	6% Redeemable non-cumulative Non-convertible Preference Shares of Rs.100/- each	Rs.2,79,28,500
Add Amount received on forfeiture of equity shares		Rs. 2,000
	Total....	Rs.82,17,55,340

Further, the Board of Directors at its meeting held on 24th October, 2005 allotted 2200 Equity Shares of Rs.10/- each pursuant to the order of the Court of the learned Civil Judge, Varanasi, which were earlier kept in abeyance at the time of allotment made to the warrant holders against the warrants held by them. There has been no other change in the issued, subscribed and paid-up capital of the petitioner after 31st March, 2005 till the date of filing of the affidavit.

Hence, the paid up capital of the

petitioner-Company as on date stands as under:

Paid up:		
7,93,84,684	Equity Shares of Rs.10/- each Fully Paid-up	Rs.79,38,46,840
2,79,285	6% Redeemable non-cumulative non-convertible Preference Shares of Rs.100/- each.	Rs. 2,79,28,500
Add Amount received on forfeiture of equity shares		Rs. 2,000
	Total..	Rs.82,17,77,340

2.7 The objects of Nirma are set out in the Memorandum of Association annexed to the Company Petition and therefore, it is not necessary to refer to the said objects in detail.

2.8 Core is a listed public limited company; it is a multi-product healthcare company manufacturing I.V. solutions, medical disposables, injectables, orals and formulations, etc. It has two units, one at Village-Sachana (Ahmedabad) and another at Village-Rajpur (Mehsana) in Gujarat.

2.9 According to the petitioner (Core), the company was incorporated in the year 1986 by the first generation entrepreneurs to manufacture

infusion and transfusion solutions. Over a period of time, Core has catapulted to the league of large international companies through its wide range of products of international quality, available across global market. This became possible due to adherence to high quality standards through use of state-of-the-art technology, and large scale manufacturing facilities. The company achieved quick growth and grand success in a short period of time. The company registered a phenomenal growth during nineties. In 1993-94, it was a company with turn over of more than 100 crores and a net profit of 21 crores. Encouraged by the same, it initiated upon an aggressive growth plan in 1993-1995, involving investment of about Rs.600 crores for expansion of its existing facility and also diversification into manufacture of medical devices. The plan was validated by the Board of Directors, consultants, lenders and also appraised by all lenders while sanctioning the loans. Based on the same, the company set up one of the world's most modern and largest pharmaceutical manufacturing facility across 600 acres of land with most modern manufacturing technology from world-renowned

suppliers. The company continued to achieve appreciable growth in sales and financial performance despite significant increase in costs, overheads and fixed charges upto 1996. The company's new manufacturing facility for I.V. Fluids won the prestigious IDMA award for 1994-95 in its very first year of operations – the highest recognition for quality assurance in Indian Pharmaceutical Industry. The facility at Sachana also received ISO 9002 approval and also was certified for GMP as per World Health Organisation (WHO) standard. The medical devices products of the company were awarded 'CE Mark'. Such quality recognitions of the new plant at Sachana reinforced the commitment of the management towards delivering international quality products.

2.10 According to the petitioner-Core, during the year 1996-97, the company experienced unprecedented cash flow mismatches adversely reflecting its ability to fulfill the commitment. This was due to the impact of increase in financial charges, non-receipt of funds in time already sanctioned by the lenders and pressure on margin in the I.V. Fluid business on

account of steep increase in industry capacity altogether. The adverse profitability situation also has its genesis in delayed execution of the project resulting out of the delayed project financing as well as increase in interest rates, which the company was compelled to absorb. As a standalone, the first generation entrepreneurial company, Core could not absorb the injury leading to major setback to the company's financial situation, operations, performance and image.

2.11 The petitioner – Core, to come out of the financial stringencies and bad liquidity conditions, took certain steps including pledge of shares, bring back funds given for specific purposes, divestiture of pharma business and power project and one time settlement with certain Banks, which enabled it to reduce its liability during the period of 1998 to 2002.

2.12 According to the petitioner-Core, the company's efforts for the settlement of the dues with its lenders failed and the company did become sick.

During the year 2001, it had to make a reference before the Board for Industrial & Financial Reconstruction (hereinafter referred to as 'BIFR' for brevity) based on the balance sheet as at 30th June, 2000. IDBI was appointed by BIFR as an operating agency. Recently, Asset Reconstruction Company (India) Limited (hereinafter referred to as “ARCIL” for brevity), an Assets management company, initiated a dialogue with banks/financial institutions for assignment of debts. Various lenders, viz. ICICI Bank Limited, Industrial Development Bank of India,State Bank of India, IFCI Limited, State Bank of Mysore, State Bank of Travankore have assigned their loan in favour of ARCIL by executing a Deed of Assignment. It is now working as a trustee of the Arcil-Core Healthcare Trust. As a consequence at the request of ARCIL, BIFR *vide* Order dated 12th January, 2005 has abated the pending reference of the company, being Reference No.149 of 2001.

2.13 Nirma, the Resulting Company, according to Core, is a leading multi-location, multi-product company and an established player in the fast moving

consumer goods segment. It is engaged in the business of manufacture of synthetic detergents, toilet soaps, linear alkyl benzene and soda ash, etc. having a turn over of approx. Rs.2,150 crores during the financial year ended on 31st March, 2005. The operating profit for the year was Rs.510 crores. The company has reserves and surplus of more than Rs.1,792 crores. The shares of the company are listed on Mumbai Stock Exchange and National Stock Exchange. 'NIRMA' today is one of the largest selling detergent brand with a sustained growth in the Indian market. The company has also penetrated and developed toilet soap segment as well as premium segment and successfully acquired substantial market share. It has established integrated soaps and detergent plants, employing the state-of-the-art technology located at Mandali, Chhatral, Moraiya, Trikampura, Kalatalav and Alindra in the State of Gujarat. The logistic advantage with the geographical dispersal of the manufacturing bases has enabled it to respond to the emerging and hitherto untapped market needs with more pro-active, dynamic and near-to-the-customer approach, resulting into savings in cost and time, both. The company

holds the highest volume share of 38% in the detergent market, mainly dominated by two players including Nirma. Extending the value for money proposition to toilet soaps, it has within a short period of time wrested about 25% market share.

2.14 Based on broad review of financial and technical operation of the demerged undertaking of Core, viz. the unit situated at Village Sachana, Taluka Viramgam, District: Ahmedabad, and pertaining to the business of manufacturing and selling of medical and pharmaceutical products, the Board of Directors of Core thought it appropriate to propose a composite scheme. The said Scheme envisages compromise with the lenders, reconstruction of the demerged company and demerger of the above referred undertaking on a going concern basis and transfer of the same to Nirma, subject to the settlement of the dues with the lenders and approval of the High Court. The management envisages the following commercial advantages:

(i) The management of the petitioner-Company is of the opinion that the demerger and transfer of the undertaking of Core to Nirma will unlock

the value and potential of the business. The Resulting Company being a financially sound company and having extensive experience to manage the products having potential of mass consumption with wide and deep market reach will be in a position to manage the unit profitably.

(ii) The I.V. Fluids manufacturing facilities of Core at Sachana being one of the largest in the world and of very high technical compatibility, the inflow of the required funds for its working operations shall provide opportunity to make the optimum use of the facilities. The domestic market as well as the export potential of the product segment shall be well exploited.

(iii) Considering the financial implications, the account of Core has so far remained a non-performing asset in the books of its lenders. Under the circumstances, the compromise proposed to the lenders under the Scheme shall provide immediate cash flow to these lenders.

2.15 The reconstruction of the demerged company is essentially a consequence to the compromise with the lenders and the same is proposed as an integral part of the composite scheme. On one hand, the petitioner-Company has substantial balance in its Share Premium Account and on the other hand, there is

substantial reduction in the value of investments, debtors, loans and advances over a period of time. The company has balance of miscellaneous expenditure as well as debit balance of profit and loss account. Similarly, as a consequence to the proposed compromise, the value of the liabilities of the company also undergoes a substantial change. The net effects of the above are to be reflected in the reconstruction account. In order to realise the realistic financial position of the company, it is proposed that an amount not exceeding Rs.5.66 crores standing in the Share Premium Account of the company be utilised to adjust/write off the balance of the said reconstruction account. Under Clause 46 of the Articles at Table 'A', which is Schedule I to the Act, and which have been adopted by the applicant generally as its Articles of Association, subject to the provisions of Sections 78 and 100 of the Act, the petitioner-Company is authorised to use its Share Premium Account for the said purpose.

2.16 Accordingly, the Board of Directors of the petitioner-Core resolved in their meeting held on 25th

October, 2005 that subject to the approvals of the shareholders and lenders and subject to directions and sanctions of the appropriate Courts, as may be required under the law, and/or any other regulatory authorities, as may be prescribed under the Act, and subject to the such permission of the Central Government and other authorities that may be necessary, a composite Scheme of Arrangement in the nature of compromise with the lenders of the demerged company, reconstruction of the said company, reorganisation of the capital of the petitioner-Company and demerger and transfer of the undertaking of Core (as defined specifically in the Scheme) to Nirma be made on the broad basis referred to in the Scheme of Arrangement. However, at the meeting of the Equity shareholders of Nirma, convened on 29th November, 2005, pursuant to the directions of this Court some modifications pertaining to the denomination of the equity share of Nirma and some clarificatory modifications were proposed to the said scheme. The same being considered and approved unanimously by the shareholders of Nirma, the proposed scheme was accordingly modified. The said

modifications were also put for consideration at all the meetings of the shareholders and lenders of the petitioner-Company and were duly approved. As reflected in the result of the meetings, the duly modified scheme was put for consideration at the aforesaid meetings and the same is now put before this Court for consideration and sanction.

2.17 The Scheme, which is in great details, is appended to the petition and the modifications approved by the shareholders held on 25th October, 2005 are also appended to the petition. The original scheme and the modifications approved by the shareholders and the lenders of the company shall become integral part of this order, therefore, it is not necessary to refer to different parts of the Scheme, however, if required, particular provisions of the Scheme would be referred to in this judgement. It is also the case of the petitioner-Company that the Board of Directors of Core and the Board of Directors of Nirma have approved the Scheme of Arrangement.

2.18 According to the petitioner, after the proposal of the Scheme, the petitioner-Company, Core, made Company Application No.357 of 2005 seeking a direction for holding of the meetings of the equity shareholders, Class 'A' lenders and Class 'B' lenders for considering the Scheme of Arrangement in the nature of compromise with the lenders and reconstruction and reorganisation of the capital of demerger between M/s. Core and Nirma and their respective shareholders. Despite objects raised by M/s. HDFC, one of the lenders, the Court allowed the application and directed as under:

> *"(a) That separate meetings of the equity shareholders, Class "A" lenders and Class "B" lenders (of the demerged undertaking, as defined in the scheme) of the applicant company be convened and held at the registered office of the company at village Sachana, Taluka Viramgam, Dist. Ahmedabad on Friday, 9th day of December, 25 at 9.30 a.m, 10.30 am and 11.30 am respectively, for the purpose of considering, and if thought fit, approving with or without modifications, the composite Scheme of Arrangement in the nature of compromise with the lenders and reconstruction of Core Healthcare Limited, the applicant demerged company,*

Reorganisation of capital of Nirma Limited, the Resulting Company and demerger and transfer of undertaking (as defined in the scheme) of Core Healthcare Limited, the applicant company to Nirma Limited, the resulting Company and its shareholders.

(b) That at least 21 days before the meetings be held as aforesaid, notice convening the said meetings, indicating the day, the date, the place and the time as aforesaid, together with the copy of the scheme of Agreement, copy of the explanatory statement required to be sent under Section 393 of the Companies Act, 1956 and the prescribed Form of Proxy shall be sent by a pre-paid letter posted under Certificate of Posting, addressed to each of the equity and preference shareholders of the applicant Company at their last known address.

(c) That at least 21 clear days before the meetings to be held as aforesaid, notice, convening the said meetings, indicating the day, the date, the place and the time as aforesaid be published, stating that copies of the scheme of Agreement, the explanatory statement required to be furnished pursuant to Section 393 of the Companies Act, 1956 and Form of Proxy can be obtained free of charge at the Registered Office of the applicant Company and/or at its Advocate's office i.e. 204, Akanksha, opposite Vadilal House, Mithakhali, Navrangpura,

Ahmedabad 380 009, be published once each in the Times of India (Ahmedabad edition) and Gujarat Samachar (Ahmedabad edition).

(d) Shri Chimanbhai R.Shah,(Past President of Chamber of Commerce as also the Institute of Company Secretaries of India) and failing him Shri Kamlesh Shah, the Director of the applicant company shall be the Chairman of the aforesaid meetings to be held on 9th December, 2005 and in respect of any adjournment or adjournments thereof.

(e) The Chairman appointed for the aforesaid meetings do issue advertisements and send out notices of the said meetings referred to above. It is further directed, that the Chairman of the meetings shall have all powers under the Articles of Association of the applicant Company and under the Companies (Court) Rules, 1959 in relation to conduct of meetings including an amendment to the Scheme or resolution, if any, proposed at the meetings by any person(s) and to ascertain the decision of the meetings on a poll.

(f) The quorum for the meeting of the equity shareholders shall be 5(five) shareholders and for the meeting of the preference shareholders the quorum shall be 3 (three) shareholders, present in person.

(g) Voting by proxy is permitted provided that the proxy in the prescribed form and duly signed by the person entitled to attend and vote at the

aforesaid meetings, or by his authorized representative, is filed with the applicant Company at its registered office at village Sachana, not later than 48 hours before the said meetings.

(h) The value of the vote of each equity and preference shareholder of the company shall be as per the entries in the Registers and/or books of accounts of the company and where the entries in the records or registers are disputed, the Chairman of the meetings shall determine the value or number for the purposes of the meetings and his decision in that behalf would be final.

(i) The Chairman do report to this Court, the result of the said meetings within 14 days of the conclusion of the meetings and the said report shall be verified by his affidavit".

The Court also observed that in view of the special circumstances and the facts of the case, the requirements, to meet the provisions of Section 101(2) of the Act with the procedure, as is required under Rules 48 to 65 of the Companies (Court) Rules, 1954, could be conveniently dispensed with.

3. Company Petition No.9 of 2006 has been filed by Nirma. The objects of the petition is to obtain sanction of the Court to the composite Scheme of

Arrangement in the nature of compromise with the lenders and reconstruction of Core the demerged Company, reorganisation of capital of Nirma Limited, the petitioner-Company, demerger and transfer of undertaking (as defined in the Scheme) of Core to Nirma, as modified at the instance of the equity shareholders at the meeting. The Board of Directors of Nirma resolved in their meeting held on 24th October, 2005, that subject to the approval of the shareholders and subject to the direction and sanctions of the appropriate Courts, as may be required under the law, and/or any other regulatory authorities, as may be prescribed under the Act, and subject to such permission of the Central Government and other authorities that may be necessary, a composite Scheme of Arrangement in the nature of compromise with the lenders of the demerged company, reconstruction of the said company, reorganisation of the capital of the petitioner-Nirma and demerger and transfer of the undertaking of Core (as defined specifically in the Scheme) to the petitioner-Company, Nirma, be made on broad basis referred to in the Scheme of Arrangement. However, at the meeting

of the Equity shareholders of the petitioner-Company, convened on 29th November, 2005, pursuant to the directions of the High Court, some modifications pertaining to the denomination of the equity share of the petitioner-Company and some clarificatory modifications were proposed to the said scheme. Accordingly, the same were considered and approved unanimously by the shareholders, and thus, the proposed scheme was modified. The said modified scheme is now put before this Court for consideration and sanction.

3.1 After passing the resolution, Nirma submitted Company Application No.358 of 2005 before this Court for appropriate orders. After hearing the parties, the Court made the following order:

> *"(a) That separate meetings of the equity shareholders and preference shareholders of the applicant company be convened and held at Tagore Memorial Hall, Paldi, Ahmedabad on Tuesday, 29th day of November, 2005 at 11.00 a.m., and 12.00 noon respectively, for the purpose of considering, and if thought fit, approving with or without modifications, the composite Scheme of Arrangement in the nature*

of compromise with the lenders and reconstruction of Core Healthcare Limited, the applicant demerged company, Reorganisation of capital of Nirma Limited, the Resulting Company and demerger and transfer of undertaking (as defined in the scheme) of Core Healthcare Limited, the applicant company to Nirma Limited, the resulting Company and its shareholders.

(b) That at least 21 days before the meetings be held as aforesaid, notice convening the said meetings, indicating the day, the date, the place and the time as aforesaid, together with the copy of the scheme of Agreement, copy of the explanatory statement required to be sent under Section 393 of the Companies Act, 1956 and the prescribed Form of Proxy shall be sent by a pre-paid letter posted under Certificate of Posting, addressed to each of the equity and preference shareholders of the applicant Company at their last known address.

(c) That at least 21 clear days before the meetings to be held as aforesaid, notice, convening the said meetings, indicating the day, the date, the place and the time as aforesaid be published, stating that copies of the scheme of Agreement, the explanatory statement required to be furnished pursuant to

Section 393 of the Companies Act, 1956 and Form of Proxy can be obtained free of charge at the Registered Office of the applicant Company and/or at its Advocate's office i.e. 204, Akanksha, opposite Vadilal House, Mithakhali, Navrangpura, Ahmedabad 380 009, be published once each in the Times of India (Ahmedabad edition) and Gujarat Samachar (Ahmedabad edition).

(d) Shri Karasanbhai K. Patel, the Chairman and Managing Director of the Applicant Company and failing him Shri Chinubhai R. Shah, (Past President of Chamber of Commerce as also the Institute of Company Secretaries of India) and a Director of the Applicant Company shall be the Chairman of the aforesaid meetings to be held on 29th November, 2005 and in respect of any adjournment or adjournments thereof.

(e) The Chairman appointed for the aforesaid meetings do issue advertisements and send out notices of the said meetings referred to above. It is further directed, that the Chairman of the meetings shall have all powers under the Articles of Association of the applicant Company and under the Companies (Court) Rules, 1959 in relation to conduct of meetings including an amendment to the Scheme or resolution, if any, proposed at the meetings by any person(s) and to ascertain the

decision of the meetings on a poll.

(f) The quorum for the meeting of the equity shareholders shall be 5(five) shareholders and for the meeting of the preference shareholders the quorum shall be 3 (three) shareholders, present in person.

(g) Voting by proxy is permitted provided that the proxy in the prescribed form and duly signed by the person entitled to attend and vote at the aforesaid meetings, or by his authorized representative, is filed with the applicant Company at its registered office at Ahmedabad, not later than 48 hours before the said meetings.

(h) The value of the vote of each equity and preference shareholder of the company shall be as per the entries in the Registers and/or books of accounts of the company and where the entries in the records or registers are disputed, the Chairman of the meetings shall determine the value or number for the purposes of the meetings and his decision in that behalf would be final.

(i) The Chairman do report to this Court, the result of the said meetings within 14 days of the conclusion of the meetings and the said report shall be verified by his affidavit."

The modifications proposed and approved by the shareholders and different classes of lenders are annexed with the company petition and shall now become integral part of this judgement in the Scheme.

3.2 According to Core, the meeting of the shareholders and separate meetings of Class 'A' and Class 'B' lenders of the Company were duly convened on 9th December, 2005. In accordance with the orders passed by the Court, Shri Chinubhai R. Shah chaired the meeting. Shri Chinubhai R. Shah reported the results of the meeting to this Court which are as under:

(a)(i) The said meeting of the equity shareholders of the company was attended by 29 (Twenty Nine) equity shareholders of the said company entitled to together Rs.16,36,12,800/- being 163,61,280 Equity Shares of Rs.10/- each. The said Scheme of Arrangement was taken as read with the permission of all the equity shareholders present at the meeting. The detailed discussions and deliberations were made on the proposed scheme. The modifications in the scheme as proposed and approved by the equity

shareholders of Nirma at the meeting convened on 29th November, 2005, for the approval of the scheme, were also put before the equity shareholders of Core and the same were explained and discussed at the meeting. Inserting the said modifications, the duly modified scheme was then put for consideration. Separate vote was taken on for both, the approval of the modifications proposed and approval of the modified Scheme of Arrangement submitted to the meeting and the same were approved unanimously.

(a)(ii) All the 29 shareholders present at the meeting, (21 in person and 8 through proxy) voted in favour of the proposed modifications. Thus, the proposed modifications were approved unanimously by the equity shareholders for being adopted and carried into effect by modifying the proposed scheme.
(a)(iii) Similarly, all the 29 shareholders present at the meeting, (21 in person and 8 through proxy) voted in favour of the proposed modified scheme. Thus, the proposed modified scheme was approved unanimously by the equity shareholders for being accepted and carried into effect.

(b)(i) The meeting of the Class 'A' lenders of the company was attended by 12 (twelve) representatives/authorised persons of the Class 'A" lenders of the said company entitled to together Rs.1,26,457.65 lacs being the value of their debt. The representatives of Oman International Bank, Dena Bank and LIC of India proposed to adjourn the said meeting for the consideration of the same. However, since the majority of the Class 'A' lenders were not in favour of the adjournment, the same was rejected and the proceedings of the meeting were undertaken.

(b)(ii) The compromise or arrangement which was circulated among them with the individual notice served upon them was taken as read with the permission of the lenders present at the meeting. The Scheme was explained in detail to the meeting and elaborate deliberations were made to consider the Scheme. The proposed Scheme was objected to by some of the lenders at the meeting and they were permitted by the Chairman to discuss the issues. The allegations made thereat were controverted by Mr.

Mihir Nanavati, an authorised representative of ARCIL, and Mr. Kamlesh Shah, a Director of Core.

(b)(iii) The modifications in the scheme as proposed and approved by the equity shareholders of Nirma at the meeting convened on 29th November, 2005 for the approval of the scheme, were also put before the Class 'A' lenders of Core and the same were explained. Inserting the said modifications, the duly modified scheme was then put for consideration. Separate vote was taken on for both, the approval of the modifications proposed and approval of the modified Scheme of Arrangement submitted to the meeting.

(b)(iv) Vote for the approval of the modifications showed the following result:

Class 'A' Lenders	Nos.	% of total present and voting	Value of Debt (Rs. in lacs)	% of total holding present and voting
In favour	7	70	111,545.40	90.42
Against	3	30	11,816.45	9.58
Invalid Votes	2	n.a.	3,095.8	n.a.

Total Present	12		126,457,65	
Total valid voting	10		123,361.85	

Out of total 12 ballot papers, two ballot papers representing the value of debt at Rs.3,095.8 lacs were treated as invalid as the same did not indicate whether the votes were cast in favour or against the proposed modifications. Thus, the proposed modifications were approved by majority of 70% in number and 90.42% in value of the Class 'A' lenders present and voting a the meeting, for being adopted and carried into effect by modifying the proposed scheme.

(b)(v) Vote for the approval of the modified scheme showed the following result:

Out of 12 lenders present at the meeting, 8(eight) lenders having the total value of their debt at Rs.112,070.40 lacs voted in favour of the resolution approving the modified scheme and 3 (three) lenders having the total value of their debt at Rs.11,816.45 lacs voted against the resolution approving the modified scheme. The vote cast by one

of the lenders viz. Bank of India having the total value of debt at Rs.2,570.80 lacs was treated as invalid as the same did not indicate whether it was cast in favour or against the approval of the modified scheme. Thus, the resolution approving the proposed modified composite Scheme of Arrangement in the nature of compromise with the lenders and reconstruction of Core, reorganisation of capital of Nirma and demerger and transfer of undertaking (as defined in the Scheme) of Core to Nirma was carried by requisite statutory majority viz. 72.7% in number and 90.46% in value of the Class 'A' lenders present and voting at the meeting.

(c)(i) The said meeting of Class 'B' lenders was attended either personally or by proxy by 68 (sixty eight) of the Class 'B' lenders (including the debenture holders) of the said company entitled to together Rs.25,869.52 lacs being the value of their debt. However, some of the lenders present at the meeting viz. Dena Bank and Bank of Baroda sought adjournment of the meeting, as they required some more time for the consideration of the scheme. It

was, therefore, proposed with the consent of all the lenders present at the meeting to adjourn the said meeting and convene the adjourned meeting on 28th December, 2005 at the same place viz. the registered office of the company at 11.30 a.m. Accordingly, the adjourned meeting was convened on 28th December, 2005. Even at this meeting, further adjournment was sought by the lenders and the said meeting was re-adjourned to 7th January, 2006. On 7th January, 2006, some debenture holders sought further adjournment and the said meeting was re-adjourned to 23rd January, 2006.

(c)(ii) The meeting was accordingly convened on 23rd January, 2006 at the registered office of the company at 11:30 a.m. The said meeting was attended either personally or by proxy by 75 (seventy five) members of the Class 'B' lenders (including the debenture holders) of the said company entitled to together Rs.34,810.05 lacs being the value of their debt. The compromise or arrangement which was circulated among them with the individual notice served upon them was taken as read with the permission of the lenders

present at the meeting. The scheme was explained in detail to the meeting and elaborate deliberations were made to consider the scheme. The modifications in the scheme as proposed and approved by the equity shareholders of Nirma at the meeting convened on 29th November, 2005 for the approval of the scheme, were also put before the Class 'A' lenders of Core and the same were explained. Inserting the said modifications, the duly modified scheme was then put for consideration. Separate vote was taken on for both, the approval of the modifications proposed and approval of the modified Scheme of Arrangement submitted to the meeting.

(c)(iii) Vote for the approval of the modifications showed the following result:

Class 'B' Lenders	Nos.	% of total present and voting	Value of Debt (Rs. in lacs)	% of total holding present and voting
In favour	71	94.67	31542.63	90.61
Against	4	5.33	3267.42	9.39
Invalid Votes	---	---	---	---
Total Present	75		34810.05	100

Thus, the proposed modifications were

approved by majority of 94.67% in number and 90.61% in value of the Class 'B' lenders present and voting at the meeting, for being adopted and carried into effect by modifying the proposed scheme.

(c)(iv) Vote for the approval of the modified scheme showed the following result:

Out of 75 lenders present at the meeting, 71(seventy one) lenders having the total value of their debt at Rs.31,542.63 lacs voted in favour of the resolution approving the modified scheme and 4 (four) lenders having the total value of their debt at Rs.3,267.42 lacs voted against the resolution approving the modified scheme. Thus, the resolution approving the proposed modified composite Scheme of Arrangement in the nature of compromise with the lenders and reconstruction of Core, reorganisation of capital of Nirma and demerger and transfer of undertaking (as defined in the Scheme) of Core to Nirma was carried by requisite statutory majority viz. 94.67% in number and 90.61% in value of the Class 'B' lenders present and voting at the meeting.

3.3 It is submitted by the petitioner that in view of the approval of the Scheme with modifications by the shareholders, Class 'A' lenders and Class 'B' lenders, the modified composite Scheme of Arrangement is required to be sanctioned by this Court.

3.4 Nirma has submitted that in accordance with the directions of this Court, Shri Chinubhai R. Shah was appointed as a Chairman of the meeting. The said Chinubhai R. Shah has reported to the Court stating, *inter alia*, that the meetings of the equity and preference shareholders of the company were convened on 29th November, 2005. The result of the discussions was as under:

(a) The said meeting of the equity shareholders of the company was attended by 110 equity shareholders of the said Company entitled together to Rs.64,39,09,360/- being 6,43,90,936 Equity Shares of Rs.10/- each. The said Scheme of Arrangement was taken as read with the permission of all the equity shareholders present at the meeting. The detailed discussions and deliberations were made on the

proposed scheme. Some of the equity shareholders proposed certain modifications in the proposed scheme. The modifications as proposed by them were explained and discussed at the meeting. They were put to vote for approval and the same were approved by requisite majority.

(b) Out of 110 votes cast at the meeting, 107 votes representing the value of shares of Rs.64,39,03,440 were found to be in favour of the proposed modifications. One vote representing the value of share at Rs.2,000/- was cast against the modifications and 2 votes representing the value of shares at Rs.3,920/- were found to be invalid as the Folio Number and the name of the shareholder did not match with that of the register of the company. Thus, the modifications were approved by the majority of 97.27% in number and 99.99% in value by the equity shareholders present and voting at the meeting.

(c) Since the proposed modifications were approved by the said meeting with requisite statutory majority, the duly modified scheme was then put for

consideration and to vote. The poll was taken to ascertain the wishes of the equity shareholders which showed the following result:

(i) 108 (One Hundred and Eight) votes were cast representing the value of the shares at Rs.64,39,06,360/-. Out of the same, 106 (One Hundred and Six) votes of the equity shareholders present, in person or through proxy, in the meeting representing the value of Rs.64,39,02,440/- were found to be in favour of the proposed resolution. Whereas 2 (two) votes representing the value of shares at Rs.3,920/- were found to be invalid as the Folio number and the name of the shareholder did not match with that of the register of the company.

Thus, the resolution approving the Scheme of Arrangement was carried by requisite statutory majority of 98.15% in number and 99.99% in value.

(d) The meeting of the preference shareholders of the company was attended by 7 preference shareholders of the said company entitled together to Rs.2,79,28,500/- being 2,79,285 Preference Shares of Rs.100/- each. The said Scheme of Arrangement was

taken as read with the permission of all the preference shareholders present at the meeting. The detailed discussions and deliberations were made on the proposed scheme. The modifications proposed at the meeting of the equity shareholders in the proposed scheme, were presented before the said meeting. The modifications as proposed by them were explained and discussed at the meeting. They were first put to vote for approval and the same were approved unanimously by the preference shareholders.

3.5 According to Nirma, since the proposed modifications were approved unanimously in the said meeting, the duly modified scheme was then put for consideration and to vote. The poll was taken to ascertain the wishes of the preference shareholders, which showed that all the preference shareholders present at the meeting voted in favour of the modified scheme and the resolution approving the modified scheme was carried with 100% majority.

3.6 After the meeting and submissions of the report by Shri Chinubhai R. Shah, to this Court, the

two companies, namely, Core and Nirma, have filed the present Company Petition Nos.9 of 2006 and 10 of 2006 for approval of the modified scheme.

4. Notices were issued to the general public and to the Central Government's Counsel.

5. In response to the public notice, M/s.Gannon Dunkerley & Company Limited has filed its objections. It is submitted by them that the scheme is detrimental to the interest of the creditors, the meetings were not properly classified, the description of the lenders as Class 'A' and Class 'B' was ambiguous, incorrect and mischievous. It is submitted by them that from the facts, it would appear that various Banks have assigned their loan in favour of ARCIL by executing a deed of assignment and that ARCIL had taken the possession of the assets of the company under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as “the SARFAESI Act” for brevity) and ARCIL is working as a trustee of ARCIL-

Core Healthcare Trust. According to them, once ARCIL had exercised the powers under the SARFAESI Act, it can never be defined as Class 'B' lender. According to them, as various creditors and Banks have assigned their loans in favour of ARCIL, neither the Banks nor ARCIL can be classified in Class 'A' lenders. Conduction of the meeting was condemned alleging that it was done in violation of the principles of natural justice, no appropriate notices were issued, the scheme is against public interest, 90% of the amount would go to Class 'A' lenders while only 10% would be paid to Class 'B' lenders, which suggests that the amount available for distribution amongst Class 'B' lenders would be negligible. They have submitted that they have already instituted suits against Core and in view of pendency of the suits, the scheme cannot be approved.

6. Another objection was raised by HDFC Bank Limited (hereinafter referred to “HDFC” for brevity), they have submitted that they are secured creditors of Core and have to recover a sum of Rs.28,70,72,244/-. According to them, HDFC has charge

over the stock of raw materials and hypothecation of movable properties as well as charge on the book debts or receivables. They submitted that HDFC has already filed recovery application, being Original Application No.77 of 2005, before the Debts Recovery Tribunal, Ahmedabad against Core for recovery of the afore-referred amount and the same is still pending. In the said Original Application No.77 of 2005, the Debts Recovery Tribunal has passed an *ex parte* order of injunction on 12th May, 2005 against Core restraining it from selling or transferring the stock of raw materials, movable properties, book debts or receivables hypothecated to HDFC as well as selling the assets and liabilities of Core to Nirma or any other party without written consent of HDFC. They submitted that they had filed their objections in Company Application No.357 of 2005. While disposing of the said Company Application, the learned Company Court has directed Core that at the time of meeting, Core would be required to disclose about all pending litigations, including the pendency of the proceedings and injunctions granted by the Debts Recovery Tribunal. They submitted that in the

explanatory statement under Section 393 of the Act sent along with the notice, convening the meeting, a list of pending civil cases was shown, including the Debts Recovery Tribunal's proceedings filed by HDFC, but, no reference whatsoever was made to the injunction order passed by the Debts Recovery Tribunal. It is submitted by HDFC that Core had deliberately and intentionally with *mala fides* and ulterior motive, suppressed these material from the shareholders and creditors and have thereby not complied with the directions given by this Court in the earlier Company Application. It is also submitted that in the reference made to the BIFR under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA" for brevity), various secured creditors of Core, who have now voted for the scheme, had requested the BIFR to make investigation into auditing of Core. The BIFR *vide* its order dated 24th January, 2003 in Case No.149 of 2001, after observing that various doubtful and unjustified, unexplainable entries in the books of accounts of Core and siphoning away of the funds, ordered to carry out

special investigative audit. Accordingly, IDBI was appointed as an operating agency and IDBI, in its turn, appointed M/s. Ernst & Young, a firm of Chartered Accountants, as a special investigative audit to conduct audit of Core. M/s. Ernst & Young, *vide* its Special Investigative Audit Report, made several observations with respect to the working of the company. According to the objector, the said report revealed various acts of malfeasance and misfeasance by the Directors of Core. It was observed by M/s.Ernst & Young that the company failed to show its books of accounts and other materials on certain occasions and M/s. Ernst & Young were left with no other alternative but to arrive at inferential conclusions. Various parts of the said reports have also been referred to in the objections. According to the objector, Core formulated an artificial definition under the Scheme of the “secured creditors”, which included only those who have security over the fixed assets of the company and they were classified as Class 'A' lenders. According to the objector, HDFC, which has security of raw materials, stocks, book debts and receivables, could

not be put under the definition of Class 'B' lenders. Their further objection is that the debenture holders as well as the unsecured creditors without their proper description, could not be included in Class 'B' lenders. It is submitted that the claim of HDFC includes the claim in respect of the Bank Guarantees given by HDFC to the Custom Authorities on behalf of Core for the performance of the export obligations of Core, the said Bank guarantees were invoked and HDFC paid the amount of the Bank Guarantees to the Custom Authorities. According to the objector, they have paid a sum of Rs.987 lakhs to the Custom Authorities for non-performance of export obligations by Core. They also submitted that they have paid a sum of Rs.106 lakhs under the Bank Guarantees to the Customs Authorities on behalf of Core. Their objection is that Schedule I read with Schedule 4 of Company Application No.357 of 2005 did not specifically reflect the crystallised liabilities for the guarantee invoked. Their submissions are that,

(i) The scheme of arrangement cannot be enforced on liabilities in respect of assets not recorded in the books of accounts of the company.

(ii) The books of account do not show true and fair view of the assets or liabilities due to or payable by the company. The Bank has specifically requested the company and the Chairman of the meeting of the creditors from time to time that liabilities should be first ascertained under the scheme under Section 391 of the Act.

(iii) The Bank in respect of amounts paid to the Custom Authorities stands in surety for all the benefits and obligations that the company was entitled to for import of capital goods under the EPCG Scheme.

(iv) The export obligations and performances by the company, after the enforcement of the guarantees against the Bank, have been revalidated at the instance of the company entitling the refund of the entire amount of guarantees enforced against the Bank. The Director General of Foreign Trade has *vide* his letter dated 27th December, 2005, issued no objection for refund of Rs.1,887.04 lakhs forfeited

against the Bank Guarantees. Such benefit or refund due has not at all been reflected in the books of accounts of the petitioner-Company. The Bank is entitled to the entire amount of refund along with interest payable by the Custom Authorities.

(v) By proposing and passing a Scheme of Arrangement, the company has acted against the interest of the Bank in compromising the Bank's position with the Custom Authorities without giving true and proper disclosures to the Court and in effect attempting to defraud public monies of the Bank.

6.1 It is also submitted by them that Core has obtained revalidation for compliance of export obligation till 8th October, 2007 and the Government of India, Ministry of Commerce has, by a letter dated 27th December, 2005 addressed to the company with a copy to HDFC, stated, *inter alia,* that he has no objection to refund the sum of Rs.987.24 lakhs already forfeited provided a new Bank Guarantee for the same amount is executed by the Bank with the

Commissioner of Customs, Mumbai. Their submission is that if the export obligations are performed, the amount of Rs.987.24 lakhs would be received by Core and the same would amount to unjust enrichment if the said amount is not refunded to HDFC. Their further submission is that if the scheme is approved, the objector would get only 3%, while Core is likely to get back a sum of Rs.987.24 lakhs by way of refund. Their submission is that this is a dishonest attempt on the part of Core.

6.2 It is also submitted by them that Core had wrongly included ARCIL in Class 'A' lenders, showing value of their claim of Rs.82,270.64 lakhs permitting ARCIL to vote in favour of the scheme. Their submission is that ARCIL had purchased the right to recover the debts from the creditors/Banks at much low price in comparison to the right to recover Rs.82,270.64 lakhs. They prayed that ARCIL be asked to give the details of the amount, which the other Banks have to recover and the amount for which the Banks /secured creditors had assigned their debts in favour of ARCIL.

6.3 At this stage, *it would be necessary to note* that this Court directed ARCIL to provide complete details of the amount, which they had paid to purchase the debt and the value of the debt they had purchased. ARCIL, through their Counsel, have filed two affidavits, in which they have given the details, clearly stating that different Banks were to recover different amounts from Core and particular amount was paid to purchase the right to recover the debt amount from Core.

6.4 The submission of the objector is that ARCIL cannot be considered as a creditor as per the original outstanding of the lenders, who had assigned the debts, but, should have been considered with reference to the value at which such outstanding was assigned to ARCIL. It is also submitted that the Scheme is bad when it provides that a sum of Rs.2.50 crores be paid to ARCIL in respect of their costs, fees, charges and expenses towards resolution /recovery of debt/liability of the demerged company to the lenders. They submitted that the expenses

borne by or to be borne by ARCIL cannot be asked to be shared by other creditors who have not consented to the scheme. It is also submitted that if ARCIL had taken over the company's assets under Section 13(4) of the SARFAESI Act, then, the properties/assets of the company can be dealt with under the provisions of the SARFAESI Act only and the company cannot deal with the said assets under the guise of the scheme and the company is not capable or entitled to hand over the possession of any of its assets to anyone. Their further submission is that the settlement amount is shown of Rs.138 crores, which Nirma will pay to Core for acquiring demerged undertaking of Core at Sachana, but, it has not been disclosed how the figure of Rs.138 crores is worked out. According to them, no valuation report for the assets of Sachana Unit was placed before the Court or before the creditors. According to them, the book value of fixed assets is more than Rs.699 crores as on 31st March, 2004 and the market value thereof is likely to be much more than the depreciated or book value. They also submitted that Nirma is acquiring Sachana Unit of Core as a going concern and as per Clause (8) of

the Scheme, Nirma is claiming set off of the accumulated losses and unabsorbed depreciation. According to the objector, Nirma is likely to claim set off of more than Rs.1,200 crores and are likely to save more than Rs.400 crores by way of tax benefits. According to them, grant of the scheme would cause loss to the revenue because the Scheme is a fraud upon the revenue. They also submitted that HDFC had filed Original Application No.77 of 2005 before the Debts Recovery Tribunal, Ahmedabad, which is pending, and as the said Recovery Act is a special Act, it would have precedence over the provisions of the Act. They submitted that the scheme be rejected.

7. Yet another objection has been filed by Oman International Bank S.A.O.G. submitting, *inter alia*, that Oman Bank is a secured creditor of the company and in terms of letter dated 7th December, 2005, they had filed their objections before the Chairman of Class 'A' lenders of the company. According to them, no reply to the objections was filed by anybody. It is submitted by them that pursuant to the consortium arrangement with the objector and Standard Chartered

Bank as a Lead Banker, they advanced a loan in the sum of USD 25 million foreign currency to the petitioner-Company. According to them, the consortium Banks led by Standard Chartered Bank filed a suit before the Debts Recovery Tribunal, being Original Application No.459 of 1999.

7.1 The said application is still pending adjudication before the Debts Recovery Tribunal, Ahmedabad. It is submitted that they have to recover a sum of USD 44,24,013.53 from the petitioner-Company and interest/costs thereon. It is submitted that on 22nd November, 2005, the objector received a fax message from the Lead Banker, informing that ARCIL would be convening a meeting of the secured lenders on 23rd November, 2005 to apprise the lenders regarding the deal details so that expected recovery for each lender (on conclusion of the deal) can be ascertained. The Lead Banker had also informed that the lenders' meeting would be held on 9th December, 2005 to record the lenders’ consent/dissent to the demerger scheme. The objector attended the meeting on 23rd November, 2005, where they received a photocopy

of the scheme of demerger floated by the petitioner-Company. It is also submitted by them that they attended the meeting of Class 'A' lenders of the company on 9th December, 2005 wherein the objector had placed letter dated 7th December, 2005 along with a copy of the objections sent to the petitioner-company with a request to the Chairman of the meeting to postpone the meeting as no adequate time was given to the lender to study the scheme and apply its mind.

7.2 According to the objector, the proposal must point out the terms of the proposal (scheme) in a manner it could be understood. They submitted that details about the availability of the assets, market value of the assets, details of the creditors who have first claim over the amount, sacrifice that is being given by the creditors, whether the company is going to continue the business, what additional benefits are likely to get if the proposal is accepted, what is the need for compromise and whether by the proposed demerger that need can be achieved by the proposer and what incentive is given to the creditors for effecting any sacrifice of their dues.

According to the objector, such details if are not supplied, then, the scheme/proposal would come under the shadow of doubt and would not make the proposal a valid proposal. They submitted that the Scheme of Compromise does not disclose the particulars of the secured as well as unsecured creditors and the amount due to each of the said class of creditors. According to them, the petitioner did not give the detailed particulars of lists of Class 'A' and Class 'B' creditors, amount due to each of the creditors falling in each of the classes, any agreement or otherwise arrived at with any class of creditors, percentage of sacrifice each of the creditors has to undergo and the criteria adopted for determining the classification.

7.3 Their further objection is that the objector had advanced foreign currency loan to the petitioner-Company, therefore, they cannot be equated with that of other Indian lenders. It is also submitted by them that the scheme of compromise does not disclose the value of assets, no valuation report is shown/indicated, without placing the valuation report

of the approved and independent valuer how would the figure of Rs.138 crores could be arrived at and the company purposefully has not given realisable value of each of the assets. It is submitted that there is no transparency in the proposal. It is further submitted that there is a conflict of interest between the creditors and it appears, according to Oman Bank, that ARCIL had prior negotiations with the petitioner-Company and Nirma. They submitted that ARCIL may be making profit in the deal, whereas the objector would be suffering losses in view of the objections raised by them. They also submitted that ARCIL would be acting as a pledgee of shares and therefore, there would be conflict of interest. It is submitted by them that the petitioner-Company's financial position has weakened and large funds have been fraudulently misapplied and/or in breach of trust have been misappropriated or siphoned off from the company. It is submitted that huge amount of money has been siphoned by the promoters of the company in the name of advancing loan to a subsidiary company. They also submitted that the explanatory statement in the notice is not in compliance with the

requirements of law. According to them, it is nowhere explained in the notice that why a composite scheme has been put forward and why issuance of shares of Nirma to the shareholders of Core are being issued at the costs of the secured creditors. Their basic submission is that the majority is trying to oppress the minority. It is also submitted that after demerger of Sachana Unit, only Rajpur Unit would be held and owned by Core, but, the value of the same is not given in the Scheme.

8. One Pankaj S. Modi has also filed his objections. According to him, he is a shareholder of Core and has a right to submit his objections. It appears that he is challenging the working of Core and is making various allegations against the management. His submission is that various notices were issued by him through his Lawyer to the Company, but, no replies were received by him. The objections of Mr. P.S. Modi can be dealt with right now.

8.1 Section 529A of the Act provides that notwithstanding anything contained in any other

provision of the Act or any other law for the time being in force, in the winding up of a company- (a) workmen's dues; and (b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 *pari passu* with such dues, shall be paid in priority to all other debts.

Sub.section (2) of Section 529A provides that the debts payable under Clause (a) and Clause (b) of Sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

8.2 Section 530 of the Act provides that in a winding up, subject to the provisions of Section 529A, there shall be paid in priority to all other debts, - (a) all revenues, etc.; (b) all wages or salary of employees; (c) all accrued holiday remuneration, etc. After all such debts are paid, the shareholders would be entitled to receive their share value and thereafter, the balance would be given to the promoters.

8.3 In the present case, undisputedly, the assets of the company is valuing at Rs.500 crores (as observed by some of the objectors) or Rs.138 crores as has been offered by Nirma, with the money the entire liability of the workmen and the secured creditors cannot be discharged. If the entire liability cannot be discharged, then, nothing would be available for paying to the shareholders. In the present Scheme, for 80 shares of Core, one share of Nirma would be offered by Nirma. If the scheme is accepted, then, every shareholder of Core would be benefited because, undisputedly and as would appear from the objections raised by the objectors, the value of the share of Core has become negligible. According to Oman Bank, the share value of Core has become negligible and if that be so, then, the shareholders of Core would get something against nothing, which they now possess.

8.4 So far as other allegations of malfeasance and misfeasance, mishandling of the property, siphoning away of the funds and purchase of the property at a higher price or advancement of the

loans are concerned, the same cannot be considered in these proceedings. For that, the objector - Mr. Modi, in his capacity as a shareholder, would be free to take appropriate action in accordance with law. The objections of Mr. Modi deserve to and are hereby rejected.

9. At this stage, I would prefer to take objections filed by the Union of India. It is to be noted that the matter is pending consideration for more than about a year. The Union of India did not propose to file their objections well within time. However, when the arguments were closed, Shri Harin P. Raval, learned Standing Counsel, appeared and submitted that he be allowed to file his objections. The Court allowed him to file written objections. The objections of Union of India are that the Union of India has to recover a sum of Rs.4,84,66,798/- from Rajpur Unit. The said amount of Central Excise Duty includes a sum of Rs.1,08,74,957/- towards the liability of Sachana Unit. An amount of Rs.3,10,000/- is due and payable towards penalty. A sum of Rs.1,10,000/- is also due and payable towards

penalty.

9.1 According to the objections, an amount of interest of Rs.7,10,30,821/- is recoverable as on 31st January, 2007. They submitted that so far as Sachana Unit is concerned, an amount of Rs.1,93,19,641/- is due. They submitted that Nirma would not take the statutory liability of Rajpur Unit and under the circumstances, they object to the grant of the Scheme.

9.2 The objections, in the opinion of this Court, are misconceived. Undisputedly, Rajpur Unit is neither being transferred nor demerged. As per the Scheme, Sachana Unit, with its excise liability, is to be demerged with Nirma and Nirma is undertaking to clear the statutory liability raised against Sachana Unit. If the Excise Department has to recover an amount of Rs.1,93,19,641/- against Sachana Unit, and such statutory liability is accepted by Nirma, then, the Excise Department would be entitled to recover the said amount from Nirma. I have already observed while dismissing the objections made by Mr.Modi that

in case a company is to be put under liquidation and the entire property of Core, including both the Units, namely, Rajpur and Sachana, are auctioned, then too, money to discharge the liability or pay to the secured creditors would not be made available. If such is the situation, then, the Excise Department even in case of liquidation and sale of the property would not be in a position to recover anything. Would it be prudent for the Excise Department to oppose to the Scheme, which provides payment of a sum of Rs.1,93,19,641/-, or to go in liquidation of the company and receive nothing. The Excise Department is neither a workman nor a secured creditor. If they are unable to get anything in the liquidation proceedings, then, it would be wise and prudent for them not to object to the scheme so that in future, they get something against nothing. The objections filed by the Union of India, being misconceived, are rejected.

10. In reply to the objections filed by the HDFC Bank, the petitioner-company, Core, has filed its reply dated 14th April, 2006. It is submitted that

possibility of Core being revived in the BIFR could not be materialized and by that time, the total exposure of all lenders of Core exceeded Rs. 1500 crores [inclusive of interest]. According to the petitioners, the lenders who are interested in reviving the company to ensure that they get their money back as early as possible, held their meetings from time to time to revive the company or to enter into some arrangement to realize their dues. ARCIL being the biggest lender [in view of the purchaser of the debts] took lead to find best possible solution of the problem and Nirma showed interest in acquiring such undertaking. It was then decided to consider for demerger of Sachana Unit of Core with Nirma. It was thought that revival of Sachana undertaking by Nirma would ensure some benefits in favour of the lenders and the workers/employees would continue to have their employment and it was also considered desirable that production from Sachana unit reaches to its best. The petitioners submit that present is not a scheme to shield the alleged misdeeds of the management of Core. It is submitted that even after demerger of Sachana unit

with Nirma, Core would continue to exist, therefore, the management/directors of Core would still be exposed to the legal action. It was also submitted that the financial institutions which were proceeding before the BIFR against the interest of the Core now decided to support the Scheme. They also submitted that the Scheme having been approved by the majority in principle as required under the law, the objection like present deserves to be rejected. It was submitted that the petitioner company did not suppress anything from anybody, but in fact, produced the order passed in Company Application in the said meetings and thereby facts of pending litigations etc. were brought to the notice of all concerned. As a fact, it is submitted that litigation of HDFC Bank and injunction obtained by it were discussed in the meetings. They also submit that letter dated 7.1.06 addressed by the HDFC Bank to the Chairman, specifically refers to the injunction order operating in favour of the HDFC Bank and the said letter was fully read out at the said meeting and was subject matter of discussion. They submit that when the facts were known to all concerned, then it would not

be proper to say that the facts were suppressed.

11. It is also submitted that the objection that some of the creditors wanted audit of Core when the matter was pending before the BIFR would lead to nothing, because present is not a case to find out whether the company is sick or not, present is a case for restructuring a company and Scheme is for compromise and/or arrangement between the petitioner company and its shareholder and lenders. They also submitted that the writing off of some amount by majority is not a question to be considered in these proceedings, because these proceedings are in relation to the Scheme and are not relating to malfeasance or misfeasance. It is submitted that the misconduct on the part of the management and mismanagement of the company concerned would not be relevant consideration, because, this Court is not required to decide that whether company suffered losses because of the mismanagement.

12. They also submitted that they did not create any artificial definition of “secured creditors”

under the Scheme. They submitted that debenture holders also held security but that does not have the first charge. According to them, Core has not placed any creditor in Class-B, which is not a lender to Core. According to them, debenture holders placed in Class-B are entitled to security albeit other than the first charge. They submitted that the allegation is absolutely misconceived. They submitted that the HDFC Bank is trying to play fraud with the Court, because at one place, they have said that information about the injunction was not supplied to the meetings and at the same time, they say that injunction order was read in the meetings with permission. For placing different creditors in different classes, it is submitted that Core has fixed assets and it also has current assets, Class-A are the lenders who had charge over the fixed assets, while Class-B are the lenders who had charge over the current assets. According to them, considering the market value of the respective assets, it was impossible to take even a tiny fraction of amount payable to various creditors and in view of this, detailed discussion was held that what should be

payable, what amount would be allocable to the fixed assets and what amount would be allocated to the current assets and after great discussion and deliberations, it was agreed that 90% of the amount should go for the benefit of Class-A lenders and 10% of the amount for the benefit of Class-B lenders. They submitted that on the appointed date, current assets, loans and advances were in sum of Rs. 2086.87 lacs, the sum included current assets in form of stock-in-trade in sum of Rs. 633.10 lacs and book debts in sum of Rs. 793.12 lacs. The remaining were loans and advances. According to them, it is only first two items, namely stock-in-trade and book debts with the subject matter of security available to all working capital lenders. The same is about 13 crores. As against this, worth of fixed assets would be much higher, say, a sum of Rs. 250 crores. They say that on the appointed date, principal amount payable to persons having first charge over the fixed asset would be more than Rs. 1300 crores while the total amount payable to the persons having charge over the current assets was approximately Rs. 350 crores. They submitted that considering the large

amount of statutory dues payable by Core, it was decided to propose a Scheme whereby Nirma would discharge all liabilities of lenders at the total price of Rs. 138 crores. According to them, total worth of the security of the Scheme of Class-B lenders on the basis of its market value today is lower than 10% which is coming to their share. They submitted that this matter is purely in the realm of the discussion, negotiations and satisfaction between the respective creditors, *inter se* and between one and another group and between all of them at one end and Nirma on the other. According to them, the issue has no bearing to the validity of the Scheme. They submit that ARCIL, certainly would be creditor of Core to the extent of Rs.82,273.64 lacs, because the lenders who had right to recover the amount and had transferred the debt in favour of ARCIL, had to recover the said amount. They submit that question that for what ARCIL had purchased the debt would be immaterial, because, ARCIL had paid some money to all such persons who had lost all their hopes to recover anything from Core. According to them, ARCIL having acquired financial assets from the

banks and other financial institutions under the provisions of Section-5 of the SARFAESI Act has become lender to the extent of the original amount and interest thereon. They also submit that ARCIL would not be benefited and is also not charging any fees, but it would be entitled to recover actual cost incurred in respect of resolution/realization of debts of lenders of Core as provided in the Scheme. It is also submitted that Nirma was not required to give break up of Rs.138 crores. Nirma, according to the petitioner, has not only to pay Rs.138 crores, but, has also to undertake statutory and other liabilities of the demerged undertaking and is also required to allot shares in favour of the shareholders of Core. They submitted that for allotment of shares or to ascertain share exchange ratio, they had obtained report from RSM & Company, Chartered Accountants, Mumbai and in any case, share exchange ratio is not bad. It is submitted that so far as the loss of Rs.1,200 crores is concerned, the amount is factually incorrect, but in any case, under the Scheme, if loss is to be forwarded to Nirma then, all the benefits should flow in favour of

Nirma. They submitted that the Scheme has not been proposed by Nirma to cause loss to the Revenue and it is not a fraud upon the Revenue because the right of carrying forward loss is recognized under the statute and if some thing is statutorily available, then to obtain the same, cannot be regarded as fraud. It is also submitted that the majority as required under the law, shareholders, Class-A lenders and Class-B lenders, if have approved the Scheme, then there is no good reason not to accept the Scheme.

13. In relation to the objection raised by Oman International Bank Limited, while repeating their submissions which were made by them in reply to the objections to HDFC Bank, they further state that Oman International Bank Limited cannot be considered to be a class different simply because it is a foreign bank. According to them, Class-A lenders, whether they are Indian or foreigners, would be taken to be Class-A lenders only. They also submit that in the meetings held in the office of ARCIL for considering the terms of the present Scheme, every objection raised by the objector was recorded

and from that it would be clear that the objector had information with him and objector being Class-A lender would not be careless in discussing the Scheme. It is submitted that the Scheme was approved by statutory majority and out of Class-A lenders, Oman International Bank is the only one lender which objects to the Scheme. It is submitted that in the Scheme of demerger, valuation of assets is immaterial. If any lender had any objections, then the same were to be projected in the meetings. Once statutory majority which includes international banks, financial institutions, foreign banks and private banks, had considered everything, then it would be too much to say that the other institutions which had higher stakes approved the Scheme without understanding it. According to them, in the meeting dated 23.11.05, ARCIL had agreed that sale proceeds from sale of shares will be distributed by it in the same manner and on the same basis as is contained in the case of Sachana unit. According to them, benefit of pledge of shares would be available to the whole body of lenders of Core and ARCIL, and ARCIL is not to make any profit from such sale. It is also

submitted that it was open to each class of lenders to oppose the Scheme if it was felt that the Scheme was unfair or against their interest. They submit that it was open to every lender to discuss with other lenders that their class had been given unfair terms and therefore the Scheme be rejected. They submit that barring present objector-Oman International Bank, everybody understood that the Scheme was fair and was not only in the interest of the Company but was in the interest of the institutions. Regarding suppression of disclosure of pledge of shares, it is submitted that the details of the pledge of the shares was known to each lender and was also known to Oman International Bank. With regard to the offer of the shares, it is submitted that probably Oman International Bank did not try to appreciate the share exchange ratio. They submit that value of each share of Core is not taken as Rs.30/-, but, in fact, it is taken as Rs.3/- and at the meeting, the Scheme was modified though effectively benefit would continue to remain the same as sub-division of shares of Nirma Limited would now be made from Re.1/- to Rs. 5/- and as such, the share

exchange ratio would now be 1 share against 80 shares of Core. It is submitted that the Scheme is not bereft of material or no decision could be taken on the said Scheme. A detailed reply was also filed against the objections raised by Gannon Dunkerley & Company Limited. It was submitted that Core has to recover amount from the said Gannon Dunkerley & Company and in any case, they have no right to raise any objections against sanction of the Scheme.

14. By affidavit dated 4th December, 2006, HDFC Bank has again raised certain objections and submitted that ARCIL is a part of Class-B lenders to the extent of Rs.3,676.63 lacs and Niya Finstock Pvt. Ltd. Company for sum of Rs.10,385.00 lacs and Astramid Technologies Limited for sum of Rs.5,371.60 lacs. They submit that the said amount cannot be reconciled with the amounts shown in the balance sheet of the petitioner. According to them, ARCIL would be getting much more and would be making very small sacrifice in comparison to those who have not agreed to the Scheme. According to HDFC Bank, it would have to forego 96.2% of its claim, while

sacrifice of ARCIL, which is the purchaser of the debts would not be to such an extent. It is reiterated that the explanatory statement circulated by the petitioner was incomplete, vague and was not providing required material. The petitioner filed its affidavit dated 5th December, 2006 in reply to objections raised by the HDFC. They submit that M/s.ICICI, IFCI, IDBI, SBI, SBM and SBT had assigned debt to the extent of Rs.37,191.00 lacs in favour of ARCIL, Dena Bank assigned debt of Rs.5,932.57 lacs in favour of M/s. Niya Finstock Pvt. Ltd., and M/s. Indus Ind Bank assigned debt of Rs.1,289.56 lacs in favour of Astramed Technologies Limited. Their submission is that purchaser of the debt, specially, ARCIL has acquired financial assets from the banks and financial institutions under Section 5 of the SARFAESI Act and it has become lender. It is further submitted that minority was not forced to accept the settlement in order to promote interest of ARCIL. Core had filed yet another affidavit dated 13/14th December, 2006, wherein, they had submitted that Core did not know that for what amount financial institutions had assigned their debt in favour of

ARCIL, but the said institutions had informed the petitioner that the debts were assigned. By further affidavit dated 5th January, 2007, it is submitted by them that the Board of Directors of the company at its meeting held on 27th June, 2006 passed a resolution for extending time up to 31st December, 2006 and ARCIL had granted its approval and thereafter Board of Directors of the Company again extended the time up to 31st June, 2007. They have also submitted that IDBI, ICICI, IFCI, SBI, SBM and SBT had assigned their debt of Rs. 82270.64 lacs in favour of ARCIL. On 9th January, 2007, HDFC Bank again filed its affidavit wherein they informed that certain bank guarantees were issued in favour of the petitioner and some of the bank guarantees have already been invoked. According to them, since the bank guarantees invoked were outside the purview of the Scheme and the corresponding assets, i.e. refund is lying with Customs, the resulting company should take over the liability and issue counter indemnity for guarantee in lieu of counter indemnity for guarantee of the petitioner company. They also submit that the appointed date for demerger is mentioned as

1.12.04 and therefore, any transaction subsequent to 1.12.04 would not be covered under the said Scheme of compromise or arrangement. They submit that the bank was required to pay amount of Bank Guarantee to the Customs on or about 15.12.04 and as it was paid beyond the appointed date, money should be refunded back to them.

15. The proceedings of hearing were going on from time to time and the affidavits were being filed as and when liked. However, after conclusion of the hearing, the parties have filed their written arguments also.

16. For proper appreciation of the dispute between the parties, it would be necessary to refer to Chapter-5 of the Companies Act. Sections 391, 392, 393 and 394 read as under:-

> ***Power to compromise or make arrangements with creditors and members.***
>
> ***391.*** *[1] Where a compromise or arrangement is proposed-*
> *[a] between a company and its creditors or any class of them; or*

[b]between a company and its members or any class of them;

the Tribunal may, on the application of the company or of any creditor or member of the company, or, in the case of accompany which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

[2] If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed [under the rules made under section 643], by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Tribunal, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or in the case of a company which is being wound up, on the liquidator and the contributories of the company:

Provided that no order sanctioning any compromise or arrangement shall be made by

the Tribunal unless the Tribunal is satisfied that the company or any other person by whom an application has been made under sub-section 01] has disclosed to the Tribunal, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like.

[3] An order made by the Tribunal under sub-section[2] shall have no effect until a certified copy of the order has been filed with the Registrar:

[4] A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed as aforesaid, or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

[5] If default is made in complying with sub-section [4], the company, and every officer of the company who is in default, shall be punishable with fine which may

extent to one hundred rupees for each copy in respect of which default is made.

[6] The Tribunal may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Tribunal thinks fit, until the application is finally disposed of.

Power of Tribunal to enforce compromise and arrangement.

"392. [1] Where a High Court makes an order under section 391 sanctioning a compromise or an arrangement in respect of a company, it-

[a] shall have power to supervise the carrying out of the compromise or arrangement; and

[b] may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

[2] If the court aforesaid is satisfied that a compromise or arrangement sanctioned under section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under section 433 of this Act.

[3] The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act under section 153 of the Indian Companies [Amendment] Act,2001, sanctioning a compromise or an arrangement."

Information as to compromises or arrangements with creditors and members.

393 *[1] Where a meeting of creditors or any class of creditors, or of members or any class of members, is called under section 391,--*

[a] with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect, and in

particular, stating any material interests of the directors, managing director or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, of the compromise or arrangement, if and in so far as, it is different from the effect on the like interests of other persons; and

[b] in every notice calling the meeting which is given by advertisement, there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such statement as aforesaid.

[2] Where the compromise or arrangement affects the rights of debenture holders of the company, the said statement shall give the like information and explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

[3] Where a notice given by advertisement

includes a notification that copies of a statement setting forth the terms of the compromise or arrangement proposed and explaining its effect can be obtained by creditors or members entitled to attend the meeting, every creditor or member so entitled shall, on making an application in the manner indicated by the notice, be furnished by the company, free of charge, with a copy of the statement.

[4] Where default is made in complying with any of the requirements of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees; and for the purpose of this sub-section any liquidator of the company and any trustee of a deed for securing the issue of debentures of the company shall be deemed to be an officer of the company:

Provided that a person shall not be punishable under this sub-section if he shows that the default was due to the refusal of any other person, being a director, managing director, manager or trustee for debenture holders, to supply the necessary particulars as to his material interests.

[5] Every director, managing director, or manager of the company, and every trustee for debenture holders of the company, shall give notice to the company of such matters relating to himself as may be necessary for the purposes of this section; and if he fails to do so, he shall be punishable with fine which may extend to five thousand rupees.

Provisions for facilitating reconstruction and amalgamation of companies.

394. *[1] Where an application is made to the Tribunal under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal –*

[a] that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

[b] that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme [in this section referred to as a "transferor company"] is to be

transferred to another company [in this section referred to as "the transferee company"];

the Tribunal may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters;

[i] the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

[ii] the allotment of appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

[iii] the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

[iv] the dissolution, without winding up, of any transferor company;

[v] the provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement; and

[vi] such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided *that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company which is being wound up, with any other company or companies, shall be sanctioned by the Tribunal unless the Tribunal has received a report from the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest:*

Provided further *that no order for the dissolution of any transferor company under clause [iv] shall be made by the Tribunal unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Tribunal that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.*

[2] Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the

order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, free from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

[3] Within thirty days after the making of an order under this section, every company in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration. If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees.

[4] In this section--

[a] "property" includes property, rights and powers of every description; and "liabilities" includes duties of every description; and

[b] "transferee company" does not include any company other than a company within the meaning of this Act; but "transferor company" includes any body corporate, whether a company within the meaning of this Act or not."

Section 391 provides for compromise or making arrangement with creditors and members. Section 392 refers to power of the High Court to enforce compromises and arrangement. Section 393 provides that what in relation to the compromise or arrangement is to be provided to the creditors and members, while Section 394 deals with the provisions for facilitating reconstruction and amalgamation of Companies Act.

17. Though details of pleadings, objections and their replies have already been summarized above, but parties have submitted their written arguments and the Court now is required to deliver judgment after deciding the written objections in the form of written arguments.

18. Nobody appeared for Gannon Dunkerly to support their objections, therefore, the same are rejected.

19. HDFC Bank says that creditors of Core have

not been properly classified, Core had clubbed secured creditors other than Class 'A' lenders, unsecured creditors and debenture holders in the category of Class 'B' lenders. The said creditors have different interests and are not homogeneous. Class-B lenders include assignees of the debt being ARCIL, Niya Finstock Pvt. Ltd. and Astramed Technologies Ltd. representing Rs.3,676.63 lacs, Rs.10,385.00 lacs and Rs.5,371.60 lacs of value of debts of Class 'B' lenders. Since the debts had been purchased at a fraction of the value by the assignees, the compromise offered under the Scheme to the Class 'B' lenders [3.8% of the outstanding amount as on the cut off date] is effectively and in substance different, for the original lenders would have to sacrifice 96.2% of their claim. According to them, assignees being the majority would ride rough shod over the original lenders-minority representing a distinct interest, despite which they have been clubbed together. Explanatory statement issued by Core does not disclose necessary facts and material in relation to the Scheme as provided under Section 393[1][a] of the Act. It was necessary to disclose

relevant material facts inter alia being that ARCIL got assigned to itself substantial debts of Core of various banks/financial institutions and ARCIL took possession of the assets of Core under the SARFAESI Act. According to them, ARCIL having purchased debt at a very low price would be entitled to 18.21% of the total value of the assigned debt and not its value of debts as Class 'A' creditor and 3.8% of the total value of the assigned debt as Class 'B' creditor. The Debt Recovery Tribunal, Ahmedabad, *vide* its order dated 12.5.05 rendered in O.A. No.77 of 2005 restrained Core from transferring its assets in any manner. The Scheme, in fact, is for winding up/dissolution of Core since its Rajpur Unit is lying closed and assets are being disposed of. The Scheme envisages reconstruction of Core by reduction of Securities Premium Account, which amounts to reduction of capital under Section 78 of the Act, despite that, a special resolution as contemplated under Section 100 read with Section 189 of the Act has not been passed for the purpose. Repeating their objection regarding bank guarantee, it is submitted that they are entitled to recover the said money and

Core or Nirma would not be entitled to retain benefits of refund, if they complete their export assurance. Transferor and transferee have not disclosed any basis for share exchange ratio fixed under the Scheme regarding issuance of new equity shares and therefore, the Scheme is bad. Demerged undertaking has not been transferred at a fair value since the same has been valued by Core at Rs.596.22 crores and the transferee would also avail benefit of carrying forward of accumulated losses and unabsorbed depreciation of Rs.1,200 crores entailing a tax saving of Rs.400 crores. The shares above 50% are held by directors/promoters of Core and each of them would be benefited. ARCIL had taken over possession of Sachana unit from Core and transferred the same to Nirma under the provisions of the SARFAESI Act. Under Section 13[4] and Section 13[6] of the SARFAESI Act, transferee is vested with all rights as if the transfer had been made by the owner of such secured assets. Therefore, the Scheme seeking demerger of the said unit is wholly misconceived. Company Petition No.48 of 1999 filed by Jost's Engineering Company Limited has been filed for

winding up of the company and the same has already been admitted for hearing. They submit that under the circumstances, the Scheme be rejected.

20. Oman International Bank has also summarized their arguments and has submitted written arguments after completion of the oral hearing. They submit that the Scheme is neither legal nor fair and reasonable. Before the Scheme came to be proposed, notices were served and possession of the secured assets was taken by ARCIL under the SARFAESI Act and the said Act has to prevail over the provisions of the Companies Act. Once the possession has been taken under the SARFAESI Act and such action has not been challenged by Core, assets are required to be disposed of in accordance with the provisions of the SARFAESI Act and sale proceeds are required to be distributed as per the provisions of the SARFAESI Act. According to the objections, the SARFAESI Act does not contemplate disposal of assets in the form of scheme of compromise and/or arrangement. According to them, the SARFAESI Act proceeds for liquidating assets to realize debts of secured creditors which

would mean that compromise and/or arrangement was not found possible and therefore, secured creditor has proceeded further to liquidate the assets. 75% of the secured creditors in value take a decision to liquidate the assets of debtor by enforcing security would imply that 75% of the secured creditors take a decision not to compromise the debt and decide to liquidate the assets. According to their objection, a secured creditor cannot be forced to compromise its debts in view of the provisions of Section 13[13] of the SARFAESI Act. It is submitted that once an action is taken under the SARFAESI Act, a borrower cannot deal with the assets of the company nor can he bind the secured creditors and nothing can be done without the consent of the secured creditors. According to them, the Scheme is inconsistent with the rights of the secured creditors. Their further submission is that apart from the Scheme being in violation of statutory right conferred upon the objector under the provisions of the SARFAESI Act, it is not a Scheme of compromise and/or arrangement but in the guise of a Scheme of compromise and/or arrangement, alternate method of winding up of the company to avoid

accountability to this Court is ruled out. They submit that the company is not retaining any business as such except “Core Logo”. Therefore, the Scheme is not for revival of the business of the company but it is for winding up business of the company. The Scheme is not legal *qua* objector in view of the recovery proceedings pending before the Debt Recovery Tribunal. The Scheme is in two parts, the first part deals with disposal of assets with liability and the second part deals with waiver of debts in full by the secured creditors. According to them, no reason worth the name is offered for the second part of the Scheme; why debt is to be waived off and and what is the nexus of the waiver of debt with the first part of the Scheme. They submit that in the guise of the Scheme, defaulting borrower wants to force upon secured creditor to waive its debts without any reason or rhyme which is nothing but coercion by majority over the minority. According to them, the report of M/s.Ernst & Young, was not produced in the meeting dated 10th January, 2005 and the Company's explanation that, it was sent to the consortium leader would amount to service

would be a bad argument. They submit that even if the objector knew about the report, then too, the question that whether proper informations were supplied or not would be a material question. They submit that there was no offer on the part of the company to get the report produced and concept of adverse inference in case of statutory requirement has no room. They submit that ARCIL cannot be considered in the category of secured creditors, because it never lent money to the company but in fact, it had purchased debts and the assignment is secured at a price much less than the amount of debts. Under the circumstances, consideration for sanctioning the Scheme of compromise for ARCIL would be different. It is also submitted by them that the Company Court has no jurisdiction to pass an order taking away effect of O.A. [DRT proceedings] and the reliefs claimed thereunder. They are placing their reliance upon the judgment of the Supreme Court in the matter of ***Allahabad Bank v. Canara Bank***, *reported in* ***[2000] 4 SCC 406***. They also rely upon a judgment in the matter of ***Fidelity Investment International PLC v. My Travel Group PLC*** *reported in* ***[2006] 1***

Comp.LT 152 [CA]. They also submit that the petitioner has approached this Court with tainted hands by suppressing and without placing valuation report of the assets of Core. They submit that the petitioners are not entitled to any of the reliefs from this Court. They place reliance upon the judgment in the matter of ***Rajasthan State Financial State Corporation****, reported in* ***[2005] 8 SCC 190****.* They submit that demerged undertaking is not being transferred for fair value and Nirma would be receiving undue benefits. In case, the company is put under liquidation and the property is sold in the market, then it would be sold for higher price and the amount which is proposed to be paid to the unsecured creditors and the shareholders would also come to the share of the secured creditors and as such objector would be entitled to much more than what he is being offered. Sections 391 to 394 of the Companies Act cannot be used as a tool to escape from criminal liability of the delinquent directors/officers of the company.

21. The petitioners, Nirma and Core, have filed

their detailed written arguments. They have referred to the historical background and the case of the petitioners, and have thereafter submitted that the objections raised by the objectors are misconceived and not maintainable. According to them, outcome of the meeting of equity shareholders of Nirma was as under:-

(i) Outcome of the meeting of Equity shareholders of Nirma Limited:

Equity Shareholders	Nos.	% of total present and voting.	Value of shares held in Rs.	% of total holding present and voting
In Favour	107	97.27	64,39,03,440	99.999
Against	1	0.91	2,000	0.0003
Invalid votes	2	1.82	3,920	0.0007
Total Present	110	100	64,39,09,360	100.000

(ii) Outcome of the meeting of Preference shareholders of Nirma Limited:

Preference Shareholders	Nos.	% of total present and voting.	Value of shares held in Rs.	% of total holding present and voting

In Favour	7	100	2,79,28,500	100
Against	Nil	N.A.	Nil	N.A.
Invalid votes	Nil	N.A.	Nil	N.A.
Total Present	7	100	2,79,28,500	100

(iii) Outcome of the meeting of shareholders of Core Healthcare Limited:

Equity Shareholders	Nos.	% of total present and voting.	Value of shares held in Rs.	% of total holding present and voting
In Favour	29	100	16,36,12,800	100
Against	Nil	N.A.	Nil	N.A.
Invalid votes	Nil	N.A.	Nil	N.A.
Total Present	29	100	16,36,12,800	100

(iv) Outcome of the meeting of Class-A lenders of Core Healthcare Limited was as under:

Class A Lenders	Nos.	% of total present and voting	Value of Debt(Rs.in lacs)	% of total holding present and voting
In Favour	7	70	111,545.40	90.42
Asset Reconstruction Company (India) Ltd.	1		82,270.64	
Dresdner Bank AG	1		13,892.19	
GE Capital through Alpa One Revitalization Vehicle	1		3,605.98	
HSBC	1		4,064.19	

Standard Chartered	1		2,570.80	
Burgan Bank	1		3,213.50	
State Bank of India	1		1,928.10	
Against	3	30	11.816.45	9.58
Dena Bank	1		3,833.11	
Oman International Bank	1		2,570.80	
LIC	1		5,412.54	
Invalid votes	2	N.A.	3,095.80	
Total votes	12		126,457.65	
Total valid voting	10		123,361.85	

(v) Outcome of the meeting of Class-B lenders of Core Healthcare Limited was as under:

Class B Lenders	Nos.	% of total present and voting	Value of Debt(Rs.in lacs)	% of total holding present and voting
In Favour	71	94.67	31,542.63	90.61
State Bank of Mysore.	1		278.3400	
Bank of Baroda	1		5,833.0000	
Niya Finstock Pvt.Ltd.	1		10,385.0000	
Astramed Technologies Ltd.	1		5,371,6000	
Chandrapur Ghadchiroli Gramin Bank	1		69.5800	
Rajgarh Sehore Kshetriya Gramin Bank	1		69.5800	

Baitrani Gramin Bank	1		139.1700	
Dewas Saijpur Gramin Bank	1		139.1700	
Barabanki Gramin Bank	1		69.5800	
Avadh Gramin Bank	1		69.5800	
JP Morgan Chase Bank NA	1		5,371.6000	
Mihir Nanavti C/o. Mushirabad Gramin Bank	1		69.5800	
Other Debendure Holders	58		0.2835	
Against	4	5.33	3,267.42	
Etah Gramin Bank	1		69.5800	
Aligarh Gramin Bank	1		313.1200	
Pragati Gramin Bank	1		14.0000	
HDFC Bank	1		2,870.7200	
Invalid votes	--	--	--	--
Total Present	75		34,810.05	

They submit that Section 391 requires that the Scheme must be approved by the majority members having not less than 3/4th in value, of the members present and voting at the meeting. According to them, The Scheme has been approved in all the four meetings by majority. They also submit that more than 50% of the shareholders have approved the Scheme and under

the circumstances, the Scheme cannot be said to be illegal.

22. I will take up the objections and their replies later on, but, at this stage, I am tempted to refer to the judgment of the Supreme Court in the case of **Miheer H Mafatlal v. Mafatlal Industries Ltd.***,[87 Company Cases 792]*. The said judgment has been relied upon by both the sides. Both sides say that what should be the approach of the Court in the matter of sanction of the Scheme. Relevant part of the said judgment reads as under:-

> *"However, the further question remains whether the court has jurisdiction like an appellate authority to minutely scrutinize the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by section 391[2]. On this aspect, the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote*

that has to be kept in view by the court. The court certainly would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise, as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. Consequently, the company court's jurisdiction to that extent is peripheral and supervisory and not appellate. The court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the company court can also be culled out from the provisions of section 392 of the Act which reads as under:-

> *“392. [1] Where a High Court makes an order under section 391 sanctioning a compromise or an arrangement in respect of a company, it-*
>
> *[a] shall have power to supervise the carrying out of the compromise or arrangement; and*

[b] may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

[2] If the court aforesaid is satisfied that a compromise or arrangement sanctioned under section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under section 433 of this Act.

[3] The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act under section 153 of the Indian Companies Act, 1913 [7 of 1913], sanctioning a compromise or an arrangement."

Of course, this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the

sanction of the court operates. It is obvious that the supervisor cannot ever be treated as the author or a policy maker. Consequently, the propriety and the merits of the compromise or arrangement have to be judged by the parties who are sui juris with their eyes open and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The court cannot, therefore, undertake the exercise of scrutinizing the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who is their best commercial and economic interest by majority agree to give the green signal to such a compromise or agreement. The aforesaid statutory scheme which is clearly discernible from the relevant provisions of the Act, as seen above, has been the subject of a series of decisions of the different High Courts and this court as well as by the courts in England which had also occasion to consider schemes under pari materia English company law. We will briefly refer to the relevant decisions on the point. But before we do so we may also usefully refer to the observations found in the oft-quoted passage in Buckley on the Companies

Act, 14th edition. They are as under [at p.473]:

> *"In exercising its power of sanction the court will see, first that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, night reasonably approve.*
>
> *The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the scheme."*

In the case of Alabama, New Orleans, Texas and Pacific Junction Railway Co., In re [1891] 1 Ch 213, the relevant observations regarding the

power and jurisdiction of the company court which is called upon to sanction a scheme of arrangement or compromise between the company and its creditors or shareholders were made by Lindley L.J., as under [at pp.238-239]:

> *"What the court has to do is to see, first of all, that the provisions of that statute have been complied with: and, secondly, that the majority has been acting bona fide. The court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can reasonably be taken by businessmen. The court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he would not*

approve it."

To similar effect were the observations of Fry L.J., which read as under [at page 247]:

> *"The next enquiry is – under what circumstances is the court to sanction a resolution which has been passed approving of a compromise or arrangement? I shall not attempt to define what elements may enter into the consideration of the court beyond this, that I do not doubt for a moment that the court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith; and, further, it must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it. What other circumstances the court may take into consideration I will not attempt to forecast."*

In Anglo-Continental Supply Co. Ltd., In re [1992] 2 Ch 723, Astbury J., a century later [sic] retired the very same propositions as under [at page 736]:

> *"Before giving its sanction to a scheme of arrangement the court will see firstly that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purpose to represent; and, thirdly, that the arrangement is such as a man of business would reasonably approve."*

The learned single Judge of the Calcutta High Court in the case of Maknam Investments Ltd., In re [1995] 4 Comp LJ 330 [Cal]; [1996] 87 Comp Cas 689 relying on a catena of decisions of the English courts and Indian High Courts observed as under on the power and jurisdiction of the company court which is called upon to sanction a scheme of merger and amalgamation of companies [at page 695]:

> *"It is a matter for the shareholders to consider commercially whether amalgamation or merger is beneficial or not. The court is really not concerned with the commercial decision of the shareholders until and unless the court feels that the proposed merger is manifestly unfair or is being proposed unfairly and/or to defraud the*

other shareholders. Whether the merged companies will be ultimately benefited or will be able to economise in the matter of expenses is a matter for the shareholders to reconsider. If three companies are amalgamated, certainly, there will be some economies in the matter of maintaining accounts, filing of returns and various other matters. However, the court is really not concerned with the exact details of the matter and if the shareholders approved the scheme by the requisite majority, then the court only looks into the scheme as to find out that it is not manifestly unfair and/or is not intended to defraud or do injustice to the other shareholders."

We may also in this connection profitably refer to the judgment of this court in the case of Hindustan Lever Employees' Union v. Hindustan Lever Ltd. [1995] 83 Comp Cas 30; [1995] Supp. 1 SCC 499 wherein a Bench of three learned judges speaking through Sen J. on behalf of himself and Venkatachaliah C.J. And with which decision Sahai J. concurred. Sahai J., in his concurring judgment in the aforesaid case has made the following pertinent observations in this connection in para 3 and 6 of the report [at pp.37, 39]:

"But what was lost sight of was that the

jurisdiction of the court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical tests. A company court does not exercise in appellate jurisdiction.

Section 394 casts a obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered into between parties that it should not be unfair or contrary to public policy or unconscionable. In amalgamation of companies, the courts have evolved the principle of "prudent business management test" or that the scheme should not be a device to evade law. But when the court is concerned with a scheme of merger with a subsidiary of a foreign company then the test is not only whether the scheme shall result in maximizing the profit of the shareholders or whether the interest of employees was protected but it has to ensure that the merger shall not result in impeding promotion of industry or obstruct growth of national economy. Liberalized economic policy is to achieve this goal. The

merger, therefore, should not be contrary to this objective. Reliance on English decisions Hoare and Co.Ltd., In re [1993] All ER Rep 105 Ch D and Bugle Press Ltd., In re [1961] 31 Comp Cas 369; [1961] Ch 270 that the power of the court is to be satisfied only whether the provisions of the Act have been complied with or the class or classes were fully represented and the arrangement was such as a man of business would reasonably approve between two private companies may be correct and may normally be adhered to but when the merger is with a subsidiary of a foreign company then economic interest of the country may have to be given precedence. The jurisdiction of the court in this regard is comprehensive."

Sen J., speaking for himself and Venkatachaliah C.J., also toed the line indicated by Sahai J., about the jurisdiction of the company court while sanctioning the scheme and made the following pertinent observations in paragraph 84 at page 528 of the report [at p. 65 of 83 Comp Cas]:

"An argument was also made that as a result of the amalgamation, a large share of the market will be captured by HLL. But there is nothing unlawful or illegal about this. The

court will decline to sanction a scheme of merger, if any tax fraud or any other illegality is involved. But that is not the case here. A company may, on its own, grow to capture a large share of the market. But unless it is shown that there is some illegality or fraud involved in the scheme, the court cannot decline to sanction a scheme of amalgamation. It has to be borne in mind that this proposal of amalgamation arose out of a sharp decline in the business of TOMCO. Dr. Dhavan has argued that TOMCO is not yet a sick company. That may be right, but TOMCO at this rate will become a sick company, unless something can be done to improve its performance. In last two years, it has sold its investments and other properties. If this proposal of amalgamation is not sanctioned, the consequence for TOMCO may be very serious. The shareholders, the employees, the creditors will all suffer. The argument that the company has large assets is really meaningless. Very many cotton mills and jute mills in India have become sick and are on the verge of liquidation, even though they have large assets. The scheme has been sanctioned almost unanimously by the shareholders, debenture holders, secured creditors, unsecured creditors and preference shareholders of bot the

companies. There must exist very strong reasons for withholding sanction to such a scheme. Withholding of sanction may turn out to be disastrous for 60,000 shareholders of TOMCO and also a large number of its employees."

In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the company court has clearly got earmarked. The following broad colours of such jurisdiction have emerged:

[1] The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by section 391[1][a] have been held.

[2] That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by section 391[2].

[3] That the concerned meetings of the creditors or members of any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

[4] That all necessary material indicated by section 393[1][a] is placed before the voters at the concerned meetings as contemplated by section 391[1].

[5] That all the requisite material contemplated by the proviso to sub-section [2] of section 391 of the Act is placed before the court by the concerned applicant seeking sanction for such a scheme and the court gets satisfied about the same.

[6] That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray same.

[7] That the company court has also to satisfy itself that the members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

[8] That the scheme as a whole is also found to be just, fair and reasonable from the point of of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

[9] Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the court there could be a better scheme for the company and its members or creditors for whom the scheme is framed. The court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the company court which is called upon to sanction a s scheme of compromise and arrangement are not exhaustive but only broadly illustrative of the contours of the court's jurisdiction."

From this judgment, it would be clear that in the Scheme proceedings, the Court does not sit in judgment over the commercial wisdom of the parties to the Scheme, the Court has supervisory role in the matter of sanction of the Scheme, the Court is not required to find out as to whether a better Scheme could have been adopted by the parties and unless the Court finds that the action of majority is manifestly unfair and fraud is involved in the Scheme, the Court cannot reject the Scheme.

23. In the matter of ***Sussex Bricks Company Ltd. [30 Company Cases 536],*** the Court has observed as under:

> *"That being the undoubted law, I think that the present scheme and present offer are undoubtedly open to criticism, and that a clever business man, a man well versed in company law and matters which influence dealings on the stock exchange, could find a good many loopholes in it. That amounts to this: the scheme is open to criticism; but does that go far enough? That is the difficulty in the present case. It has not been suggested on behalf of the applicant that there has been any bad faith or any*

intentional misleading of the applicant, but although the scheme is open to a good deal of criticism, which might be enlarged on at great length in one or more circulars, what exactly the effect on the mind of the shareholders would have been I do not pause to inquire. That the scheme is open to criticism I have no doubt, but can it be said therefore to be unfair? I think it is rather difficult to predicate unfairness in any case in which there has been perfect good faith on the side of the person who is alleged to have been unfair. I think that the applicant is faced with the very difficult task of discharging an onus which is undoubtedly the heavy one of showing that he, being the only man in regiment out of step, is the only man whose views ought to prevail. That is the difficulty he is faced with in the present case.

I agree that certain criticisms set out in the applicant's affidavit show that a good case could be made out for the formulation of a better scheme, of a fairer scheme, one of one which would have been more attractive to the shareholders if they could have understood the implications of the criticisms. I have no doubt at all that a better scheme might have been evolved, but is that enough? Is it necessary to establish the validity of such an offer as put forward in the present case? Is there any point in the scheme on which a

better view might have prevailed, and rather more generous treatment might have been offered to persons whose shares are sought to be expropriated? A better and fairer offer might have been made, possibly, but I do not think that because a scheme is not 100 per cent fair or right there is the kind of unfairness with which Maugham J. was dealing in the case to which I have referred. The mere finding of items, or details, in the scheme which are open to valid criticism, is not unfairness consistent with the spirit of that judgment.

A scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies to the extent of 100 per cent, with the highest possible standards of fairness, equity and reason. After all, a man may have an offer made to him and, although he would prefer something better, would be quite prepared to accept it because it was good enough in all the circumstances. It may be that the grounds for criticizing the present scheme are not grounds of such a nature as to render the whole think unfair n the sense in which Maugham J. used the words in the case which I have cited.

Without putting my own view as to how this scheme could have been improved and made a

little more favourable and a little more fair, perhaps, to the ordinary shareholders, I do not think that unfairness in the sense in which it has been used in the reported cases has been established. It must be affirmatively established that, notwithstanding the view of the majority, the scheme is unfair, and that is a different thing from saying that it must be established that the scheme is not a very fair or not a fair one; a scheme has to be shown affirmatively, patently, obviously and convincingly to be unfair."

The said judgment has been followed by the Calcutta High Court in the case of *Maknam Investments Ltd. [87 Company Cases 689] as also Mumbai in case of Larsen & Toubro Co. Ltd. [121 Company Cases 523].* From the above referred judgment it would again be clear that unless the Court records that the Scheme is absolutely unfair and tantamounts to fraud and unfair to the meanest intelligence is not commercially viable and is patently illegal, the Court should not reject the Scheme.

24. In the matter of ***Navjivan Mills Company Ltd. [42 Company Cases 265],*** the Court has observed as

under:

> *"As a second limb of the argument, Mr. Shah contended that the proposed scheme in terms is not a scheme of compromise and arrangement but it is a take-over bid and would be a scheme or contract as envisaged by section 395 of the Companies Act and unless the petitioners have strictly complied with the provisions contained in section 395, this court cannot accord sanction to the scheme. If the proposed scheme is not a scheme under 391 but is a scheme or contract involving transfer of shares as envisaged by section 395, no question of court according sanction to such a scheme arises because a scheme or contract involving transfer of shares as contemplated in section 395 does not require sanction of the court. Only dissenting shareholders can move the court against compulsory acquisition on the allegation that the whole attempt of take-over is unfair. It is, therefore, necessary to find out whether this is a scheme of compromise and arrangement which would fall squarely and fairly within section 391. If it falls under section 391, it would be presently pointed out that even if it achieves the same result which would be achieved under section 395, it would nonetheless be a scheme under section 391 and can be sanctioned as a scheme of compromise and arrangement under section 391. Section 391 provides for sanction*

of a scheme of compromise and arrangement. Such a scheme may provide an exceptional procedure to modify or abrogate the rights of shareholders, debenture holders and creditors. They are variously described as reconstruction, reorganization, schemes of arrangement, amalgamation, mergers or takeovers; but none of these terms is clearly defined and connotes a distinguishable legal meaning. As Gower in the principle of Modern Company Law third edition, observed in general, the expression 'reconstruction, reorganization or scheme of arrangement' is employed when only one company is involved and the rights of its investors and occasionally of its general creditors are varied, the last expression being more commonly employed when creditor's rights are affected. Under an amalgamation, merger or takeover, two or more companies are merged either de jure by a consolidation of their undertaking, or de facto by the acquisition of a controlling interest in the share capital of one by the other or of the capital of both by a new company. It has now been established that the compromise and arrangement covered by section 391 are of the widest character ranging from a simple composition or moratorium to an amalgamation of various companies with a complete reorganization of their shares and loan capital. The next question is: what do the words 'compromise' and 'arrangement' connote? Pennington on Company Law

has observed as under:

> *'A compromise has been described as an agreement terminating a dispute between parties as to the rights of one or both of them, or modifying the undoubted rights of a party which he has difficulty in enforcing. An arrangement, as the expression is used in the Companies Act, 1948, embraces a far wider classes of agreement, and it need be in no way analogous to a compromise, so that it will include agreements which modify rights about which there is no dispute, and which can be enforced without difficulty.'*

If such is the wide meaning of the word 'arrangement', the fact that the scheme of compromise and arrangement for transfer of control of a company by acquisition of all its shares can be effected by an offer to acquire shares coupled with the power to compel dissenting shareholders to transfer their shares under section 395 it does not prevent the court from approving the scheme under section 391. Amalgamation or merger or take-over may be brought about in various ways. In fact there are different provisions in the Companies Act by which the same result can be achieved. A scheme of arrangement may also enable the company to acquire shares of the other company. This would be by way of arrangement between the company and

its own shareholders. A rank outsider can also take over the other company by following the procedure prescribed in section 395. The same result can be achieved by proceeding under section 484. The question, therefore, is whether a particular scheme is one which falls under section 391 or section 395 or section 484 must be examined in the background of its own facts. It may be that the ultimate result may be the same but that would not mean that it is a scheme not under one but other sections. The principal question is whether such a scheme by which one company is covered from independent public limited company into a wholly owned subsidiary company of the other public limited company could be sanctioned under section 391. Mr. Shah may be right in saying that such a thing can be done under section 391. That is not the test. The test is whether it could be done under section 391.

Now before referring to a decision on this point, I should like to notice that sections 391, 393, 394 and 395 are in pari materia with sections 206, 207, 208 and 209 of the Companies Act, 1948 [United Kingdom]. In fact we have almost bodily incorporated those provisions. The interpretation of identical provisions of the Companies Act, 1948 [United Kingdom] would undoubtedly assist in finding out the true scope and ambit of the identical provisions included in our Companies Act, 1956. The question in

terms raised is whether the scheme of compromise and arrangement by which one company takes over the other company can be brought about by way of scheme of compromise and arrangement. If it is done under section 391, it could not be done without the company which is being taken over being a party to it. It could be done ignoring the company if the procedure prescribed in section 395 is followed. Any scheme of compromise and arrangement under section 391 must undisputably be between the company and its creditors and members or any class of them. But under section 395 an individual or a company may directly by making offer to the shareholders of the other company and completely ignoring the company buy over the shares and if they are in a position to buy or acquire nine-tenths of the total shares they can force the dissenting minority to compulsorily sell its shares to the purchaser. This result can be brought about by sidetracking the first company. The contention, however, is whether such a thing can at all be said to be a scheme of compromise and arrangement between the company and its shareholders and creditors. In other words, Mr. Shah specifically contended that where by a scheme of compromise so called attempt is made to take over one public limited company by another public limited company, it can never be said to be a scheme of compromise and arrangement between the company and its

shareholders and members. There is no compromise between the company and its shareholders and it was urged that this can hardly be said to be an arrangement. The word 'arrangement' may not be so narrowly construed. The word 'arrangement' is such that where even there is no dispute, arrangement can be brought in. 'Compromise' postulates existence of a dispute and giving and taking on either side. 'Arrangement', on the other hand, is something by which parties agree to do a certain thing notwithstanding the fact that there was no dispute between the parties. If such is the wide connotation of the word 'arrangement' as used in section 391, obviously, the arrangement by which shares of one company are taken over by the other company would not be outside the scope of the word 'arrangement'. In this connection, I should first like to refer to In re Guardian Assurance Co. In that case the Guardian Assurance Company wanted to take over Reliance Marines Insurance Company Ltd., by proposing a scheme of compromise and arrangement under section 120 of the Companies [Consolidation] Act, 1908, which again is in pari materia with section 391 of our Companies Act. The proposed scheme was an extreme case to which the word 'arrangement' could be stretched to cover. By the proposed scheme, the capital of the Guardian was to be consolidated and redivided and such redivided shares were to be issued to the shareholders of Reliance Marine

Insurance Company Ltd. [hereinafter referred to as "Reliance"] in proportion of 2:1. Now, the Guardian was not in a position to issue fresh capital. It was, therefore, provided that that portion of the shares held by shareholders of Guardian shall be compulsorily acquired for allotment to the shareholders of Reliance. The scheme in a nutshell was that for one share of Reliance two shares of Guardian would be issued and Guardian shall acquire such number of shares for allotting it to the shareholders of Reliance by acquiring the same from its shareholders. Therefore, the shareholders of Guardian had to compulsorily part with a portion of its shares for being allotted to shareholders of Reliance in return for taking over shares of Reliance. In my opinion, this is an extreme case of arrangement and when the scheme came up for sanction before Younger J. he was of the opinion that as the shareholder of a company cannot by any device escape from his liability to pay in full the nominal amount unpaid upon his shares, so he cannot be called upon to pay to the company's funds more than his agreed contribution in respect of his shares. It was, therefore, felt that it would be a remarkable thing to find that any section of the Act authorized a majority of his fellow shareholders to require, even with the approval of the court that same shareholder to return to the company a part of what he had received from it in respect

of his statutory obligations, such return being for a purpose which the company could quite conveniently achieve and if so ought assuredly to provide for out of its own corporate funds. Justice Younger further felt that there is attached to the section throughout its history the idea of some difficulty to be resolved by a compromise or arrangement of rights on one side or the other a situation which prior to the enactment of the section only necessitated winding up of the company. He was, therefore, not inclined to extend section 120 to cover up a scheme of arrangement which compelled a shareholder to part with his own shares in return for shares of some other company. He rejected the scheme on the ground that the scheme itself could not be said to be either compromise or a disputed claim or an arrangement between shareholders of Guardian and the Guardian. In the opinion of Younger J., the word 'arrangement' was applicable only where there was some controversy or some difficulty. The matter was carried in appeal and Lord Cozens-Hardy M.R. did not accept the interpretation of the word 'arrangement' made by Younger J. Negativing the contention that the shareholders of Reliance would be getting two shares of Guardian and the shareholders of Guardian would be receiving one share of Reliance, could not be said to be an arrangement between the shareholders of Guardian and

Guardian, it was observed as under:-

> *'Then it is suggested that the proposition which the Reliance shareholders said they were willing to accept should be given effect to by an order sanctioning an arrangement between the Guardian Company and its shareholders which would make it obligatory upon a few dissentient shareholders in the Guardian Company if there be any dissentients, to contribute out of their own shares a certain proportion, and that proportion is made more workable by sub-dividing the shares of the Guardian into fully paid preference and ordinary shares not fully paid up. The details seem to me to be worked out with great care and great accuracy in the agreement, but it is not necessary in any way for me to discuss them here. I think what is proposed to be done in perfect good faith, and for very good business reasons, is not compromise, but is an arrangement proposed between a company and its members, using the words of section 120, and that there is no necessity to put such limitation upon those words as Younger J. felt bound to do.'*

Warrington L.J. and A.T. Lawrence J. concurred and the scheme was sanctioned. I would also refer to In Re National Bank Ltd. The Scheme

which was submitted to the court for its sanction under section 206 of the Companies Act, 1948 (U.K.) (Which is in pari materia with section 391 of our Companies Act), was as under:

> *'The proposals involve the division of the National Bank's business into two parts, the assets and liabilities attributable to the Irish business being transferred to a new Irish company, the National Bank of Ireland Ltd., ['N.B.I'], while the assets and liabilities attributable to the English business will remain with the National Bank, N.B.I. will then be acquired by the Irish Bank.' - that is to say, the Bank of Ireland - 'and the National Bank will become a wholly-owned subsidiary of the Scottish bank.'*

I have taken pains to set out the broad outlines of the scheme to show that the scheme which I am now considering is almost identical though not as complicated as one in the aforementioned case, the very effect of the scheme if sanctioned being to make National Bank which had proposed the scheme wholly-owned subsidiary company of the Scottish bank. In the case before me, the scheme is between Navjivan and its shareholders and creditors, sponsored by Kohinoor and the scheme if sanctioned would have the effect of making Navjivan a wholly-owned

subsidiary company of the Kohinoor. The question in terms raised is; can such a thing be said to be a scheme of arrangement between Navjivan and its creditors and shareholder? and, secondly, whether it can be sanctioned under section 391? Second question raised by Mr. Shah will also stand answered by this decision that such a scheme would be covered by section 395 and the procedure contemplated therein should have been carried out. When the scheme in the National Bank case was being considered in the Chancery Division, a contention was in terms raised that the scheme was not one under section 206 [section 391 of our Companies Act] but one under section 209 [Section 395 of our Companies Act]. Both the contentions are answered in favour of the company proposing the scheme. Such a scheme can be said to be a scheme of arrangement between the company whose shares are being taken over and its creditors and shareholders and that such a scheme can be sanctioned under section 391 and it is not obligatory to carry out the procedure prescribed under section 395. The scheme has in fact been sanctioned. It, therefore, appears both on principle as well as on authority well settled that where by a scheme partially of compromise and partially of arrangement the shares of one company are being taken over by another company converting the first mentioned company into a wholly=owned subsidiary company of the second mentioned

company, it can nonetheless be a scheme of compromise and arrangement which if found to be just, fair, legal and workable and if properly approved can be sanctioned under section 391. Even if the effect of sanctioning the scheme is take-over of the first company by the second company, it would be no answer to say that it can only be done under section 395.

In the aforementioned case, the contention raised was that where arrangement under section 206 is in essence a scheme or contract for the purchase by an outsider of all the issued shares of the company, the court should not approve the arrangement unless both [1] the petitioner proves on full disclosure that the price is fair, and [2] the arrangement is approved by the 90 per cent majority referred to in section 209. It was urged that arrangement brought before the court was one of section 209 character and was not approved by the appropriate majority. Repelling this contention, it was observed as under:-

> *'As regards Mr. Suenson-Taylor's second objection, namely, that the scheme really ought to be treated as a section 209 case needing a 90 per cent majority. I cannot accede to that proposition. In the first place, it seems to me to involve imposing a limitation or qualification either on the*

generality of the word 'arrangement' in section 206 or else on the discretion of the court under that section. The legislature has not seen fit to impose any such limitation in terms and I see no reason for implying any. Moreover, the two sections, sections 206 and 209, involve quite different considerations and different approaches. Under section 206 an arrangement can only be sanctioned if the question of its fairness has first of all been submitted to the court. Under section 209, on the other hand, the matter may never come to the court at all. If it does come to the court, then the onus is cast on the dissenting minority to demonstrate the unfairness of the scheme. There are, therefore, good reasons for requiring a smaller majority in favour of a scheme under section 206 than the majority which is required under section 209 if the minority is to be expropriated."

It would thus appear that even if the scheme of compromise and arrangement in essence involves acquisition by one company of the whole of the share capital of another company notwithstanding the fact that 90 per cent of the shareholders do not agree as envisaged by section 395, the same can still be sanctioned under section 391 and it is no answer to the problem that such a

scheme can only be considered under section 395.

At this stage, one submission of Mr. Shah may be noticed. It was urged that section 209 of the English Companies Act differs in one respect from section 395 of our Companies Act inasmuch as there is no provision analogous to sub-section [4-A] of section 395 in section 209 of the English Companies Act. That hardly makes any difference. Sub-section [4A] was introduced to protect the interests of the shareholders. If, therefore, anyone takes resort to section 395, he is bound to carry out the procedure prescribed under sub-section [4A]. If the scheme is in terms a scheme under section 391, it could not be rejected on the ground that the procedure prescribed in sub-section [4A] of section 395 is not carried out. In fact the consenting majority required in section 391 is advisedly kept lower than the consenting majority required under section 395. When a scheme under section 391 is sponsored, at the outset, it must come before the court and the court has supervision over it at every stage. When it is proposed, the court can prima facie examine it while giving directions under section 391[1] for convening meetings and the scheme cannot finally go through unless sanction under section 391[2] and the court, apart from various legal technicalities, can refuse to exercise discretion in favour of the scheme if it is

shown to be oppressive to the dissenting members or if it is shown that the majority has almost imposed itself upon the minority. The scheme or contract of transfer of shares as contemplated in section 395 may not even come to the court. It can only come to the court if the dissenting minority challenges the proposed offer as unfair and the burden will be on them to show that the proposed offer is unfair. In a scheme under section 391 the fact that the scheme is fair and reasonable and is such that honest men guided by best of commercial instincts would approve, has to be established by the sponsors and the dissenting minority has only to show that the court should not exercise discretion in favour of such a scheme. But in a scheme under section 395, it can only come to the court at the instance of dissenting minority and burden will be on them to show that the price offered is unfair. This is clearly a distinguishable feature between the scheme under sections 391 and 395; and in my opinion both operate in different fields and one has no impact on the other even though the ultimate result that may be achieved by the one or the other scheme may be the same. The present scheme in my opinion being one under section 391[1] it is immaterial and irrelevant whether any procedure prescribed in section 395 has or has not been carried out.

The third limb of the submission under this head

was that the scheme is in fact a scheme of amalgamation of the Navjivan with the Kohinoor and, therefore, the procedure prescribed under section 394 ought to have been carried out. This point may be disposed of briefly by merely saying that the scheme does not envisage amalgamation of Navjivan with the Kohinoor. The effect of the scheme as and when implemented would be that Navjivan would be a wholly-owned subsidiary company of Kohinoor. It will still retain its own independent identity with this difference that all its shares will be owned by Kohinoor. This is not amalgamation of two companies in the sense in which the word is understood in section 394. It is, therefore, not necessary to carry out the particular procedure prescribed under section 394 before the scheme is sanctioned."

25. In the matter of ***Larsen & Toubro*** *[supra]* the Bombay High Court has observed as under:

"Arrangement:

The first and foremost issue is meaning, scope and purpose of "arrangement". He scheme of arrangement in question falls within the ambit of the provisions of section 391 to 394 of the Companies Act and the rules made thereunder. The word "arrangement" is not specifically defined under the Companies Act. This scheme of arrangement has the ingredients of demerger and

reduction of share capital and scheme of arrangements with the concerned companies and trust, cannot be said to be beyond the purview of sections of the Companies Act. The scheme of arrangement in question, therefore, is maintainable. The word "arrangement", though not defined specifically, has a wide range and ambit. The present scheme of arrangement is between the petitioner-companies and its shareholders and/or creditors and a trust. By that itself it cannot be said that the scheme of arrangement in question is not maintainable or not sustainable. The scheme is affecting the shareholders and the creditors as the cement division of the petitioners is being transferred to the transferee company. There is no objection raised even by the Regional Director about the maintainability of the scheme of arrangement. It is difficult to reject the whole scheme of arrangement like this, which has definitely an element of demerger and reduction of shares which are a permissible mode of various schemes under the provisions of sections 391 to 394 merely on technical grounds. Investment Corporation of India Ltd., In re [1987] 61 Comp Cas 92 [Bom.], the word "arrangement" has been interpreted in a wider manner. Another case is Guardian Assurance Company, In re [1917] 1 Ch D 431 [CA] to demonstrate that the word "arrangement" has a wide meaning and interpretation, even under the English laws. The

extract of the relevant paragraphs are:

> *"Mr. Bulchandani has next argued that section 391 of the Companies Act contemplates that where a compromise or arrangement is arrived at between the company and its creditors and/or the company and its shareholders; it may approach the court for the sanction of the same. The expression 'arrangement' has been defined in section 390, sub-clause [b], which reads as follows:*
>
> *"390. In sections 391 and 393 ...*
> *[b] the expression "arrangement" includes a reorganization of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes or, by both those methods; and ..."*
>
> *The proposed scheme does not contemplate a reorganisation of the share capital of the company by the consolidation of shares of different classes. On the other hand, the scheme contemplates an adjustment or modification of rights, and if this be so, then it cannot fall within the ambit of the expression 'arrangement' used in section 390. In support of his contention as to the import of the word 'arrangement'*

in section 390 of the Act, Mr. Bulchandani relied upon the observations in Hindustan Commercial Bank Ltd. v. Hindustan General Electrical Corporation [1960] 30 Comp. Cas.367; AIR 1960 Cal 637, and the observations in Chowgule and co. P. Ltd., In re [1972] TLR 2163. Mr. Bulchandani urged that in view of this, the petitioner would not be entitled to come under section 391 and hence no relief can be granted on this score.

I am unable to accept this contention. The word 'arrangement' as set out in section 390[b] is an inclusive definition and contemplates all arrangements and not only reorganization of the share capital. This is all the more clear, because the word used is 'includes'.

Coming to the case of Hindustan Commercial Bank Ltd. v. Hindustan General Electrical Corporation [1960] 30 Comp Cas 367; AIR 1960 Cal 637, I do not see how this case can assist Mr. Bulchandani for in paragraph 27 it has been stated as follows:

> *'The word "arrangement" in section 391 is of wide import. By section 390, "arrangement" includes reorganization of the share capital of the company by*

the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods. The court has the power to sanction a scheme of arrangement though the scheme modifies the special rights attached to a class of shares.'

These observations on the contrary support the position that the word 'arrangement' used in section 391 is inclusive and that a scheme of arrangement which modifies rights of the shareholders can be brought under this section."

Guardian Assurance Company, In re [1917] 1 Ch D 431 [CA]. the Chancery Division observed as follows:

"In think what is proposed to be done in perfect good faith, and for very good business reasons is not a compromise, but is an arrangement proposed between a company and its members, using the words of section 120 and that there is no necessity to put such a limitation upon those words as Younger J. felt bound to do. With the greatest possible respect to him, having carefully considered his very able judgment, I am unable to come to the same

conclusion as he did.

I think the order ought to be made as asked by the petition.

Warrington L.J. I am of the same opinion. The scheme which we are asked to sanction is no doubt one of a somewhat unusual nature, but for all that it may still be an arrangement within the meaning of the 120th section of the Act."

At this juncture, it is necessary to refer to the arrangement in the present scheme in question. It is not a case of amalgamation as contemplated under the provisions of sections 391 to 394. In the present scheme, there is no transferor company merging into a transferee company and/or is dissolved without winding up. The present scheme admittedly is a composite scheme; and it envisages a demerger, i.e., the transfer only of the cement undertaking of the petitioner [L & T] to the transferee company, a wholly owned subsidiary of the petitioner-company and the issuance of shares by the transferee company to the shareholders of the transferor company. Both the companies continue to remain in existence. The effect of the scheme is that the shareholders of the transferor company

become the shareholders of the transferee company while retaining their shareholding in the transferor company. In the present scheme, the cement assets which were in the transferor company, are now held by the transferee company, who issues shares to the shareholders of the transferee company. The concept of demerger is well-established and explained under the Companies Act as well as under the Income-tax Act. The Bombay High Court, in Nicholas Piramal's case [2004] 121 Comp Cas 623 [Bom], while considering a scheme of arrangement, sanctioned such scheme and therein also proportions of the shares were fixed and accordingly decided as per the proposed scheme of arrangement. Therefore, in the circumstances, I see no reason not to consider the present scheme of arrangement on the merits. The objectors have been unable to point out any other provisions whereby such scheme can be objected to or rejected. Mere general allegations are not sufficient. In the facts and circumstances of the case, the scheme of arrangement, in the absence of any specific bar or limitation, falls within the ambit of sections 391 to 394 of the Companies Act and is maintainable. These company petitions were already admitted and parties have already acted on that basis and

further, all legal formalities have also been completed. Therefore, now there is no reason to accept any objection to the effect that the present scheme of arrangement cannot be sanctioned under the provisions of sections 391 to 394 of the Companies Act.

The word "arrangement" has a very wide dimension. It is a term of wider connotation. Section 390 of the Companies Act itself provides that arrangement includes reorganization of the shares, share capital of the company by the consolidation of shares of different classes."

26. From the above referred two judgments, it would clearly appear that the objections raised by the objectors that such Scheme is not envisaged under the Companies Act is not a good ground to oppose the sanction of the Scheme. In fact, all the petitioners are correct in submitting that the objections are raised by the objectors on an incorrect assumption that both the units of Core are being dealt with under the present Scheme. After going through the entire Scheme, I am of the

considered opinion that in fact, the Scheme deals with only one unit of the petitioner-Core. In the opinion of this Court, demerger of one unit of a company would also come under an agreement/arrangement, because, if demerger is not taken to be an arrangement, then the Company would not be able to deal with its property in accordance with law.

27. According to the objectors, directors and promoters of Core are holding more than 50% equity shares of Core and would be benefited under the Scheme. The objections raised by the objectors, in the opinion of this Court are misconceived, firstly because it is undisputed that the promoters have already pledged their shares and the person holding shares would now be benefited and secondly, because ARCIL has clearly stated that the benefit of share exchange ratio would be shared by all. I have no reason to disbelieve the submission of the petitioner that 30% of the total capital [promoters' holdings] has already been pledged by them with ARCIL and the proceeds from the sale of shares held by ARCIL would be distributed for the benefits of the lenders. The

promoters would not be getting share of Nirma and this aspect is clearly noted in the second meeting of the lenders which is available on the record at pages 562 and 563.

28. So far as the question of the Scheme being bad because of the lack of particulars is concerned, the petitioners submit that the representatives of the objectors remained present in both the meetings of the lenders wherein complete details were discussed and the objectors also remained present in the meeting convened under the orders of the Court. In the said meeting, each and every issue was discussed. According to them, out of the lenders who were more than 100 in number, only two objectors found that the details were not available. The objection raised by the objectors cannot be accepted because the said details were already available and all required particulars were given. If some particulars were not made available, then too, details were made available, the parties knew about the facts and in fact, everything was read over in the meetings. The objectors have not challenged the

submission of the petitioners that particulars/report of Ernst & Young was sent to their leader, who in their turn had sent the same to the members of the Consortium. If the facts were already available and the details were in the pocket of the objectors, then non-submission of the same or production of the same before two objectors could not change the legal issue nor the same is going to tilt the balance in favour of the objectors. If the objectors are making allegations of *mala fides* against the petitioners, then they are also required to show that they are not acting in bad taste with *mala fides* or dishonesty. The objection cannot be raised just for the sake of objection, objection must be on sound footing and objection must be based on factual datas. In the present case, the objectors are simply saying that because of lack of particulars, the Scheme is bad. In fact, the Scheme meets with the requirements necessary under the provisions of law. The Scheme in particular dos not make any attempt to suppress any fact.

29. The objection of the objectors say that

valuation report was not supplied to them and therefore, the Scheme should not be accepted. Submissions of the petitioners are that Core and Nirma have stated on oath that they did not have copy of the report of valuation which was carried by M/s.Ernst & Young at the instance of ICICI and a party is not expected to place on record the documents which it does not have. According to them, report of M/s.Ernst & Young is available with Oman International Bank and HDFC and they are suppressing the same and are not producing it on the record.

30. It would be clear from the letter dated 10th February, 2005 [page-166 of the Company Petition No. 9/06] of ARCIL whereby it has sent copies of the said valuation report to various lenders as per the list at pages 167-169. HDFC Bank and Standard Chartered Bank are named in the same. Standard Chartered Bank was provided two copies; one in its personal capacity and second in its capacity as representative bank having foreign exchange exposure in Core, in capacity as lead Trustee and Agent of the Consortium, of which Oman International Bank is a

member. The said Standard Chartered Bank, in its turn, had sent copy of the report to M/s. Oman International Bank. It would also be clear that case of the petitioner Nirma in its affidavit dated 5th December, 2006 [page-150 of Company Petition No. 9/06] is that the report was circulated amongst all lenders of Core and the lenders had complete information about the worth of Core. These facts stated on oath have not been controverted by anybody. It would also be clear from the records [page 149 of Company Petition No. 9/06] that the worth of assets of Core was Rs.137.2 crores [Gross] and Rs.115.9 crores [Net] after considering the statutory liabilities in Core. I am unable to hold that the lenders did not have valuation report. In fact, the lenders had the valuation report with them and in any case, non-supply of the said report to a person who knew about the report is not going to make any difference. It is also to be seen that thumping majority had found that the Scheme is fare and reasonable, then it would not be possible to hold that any further valuation report would have changed the exercise of discretion. I must agree with the

petitioner that it is in the realm of commercial wisdom of the creditors as to what should be the amount payable to them under the Scheme of compromise. Furthermore, statutory majority of the lenders believe that instead of waiting for years together and getting uncertain amount of money, it would be advisable to take what is offered to them under the Scheme immediately, then majority decision cannot be bypassed or thrown away because some are raising some technical objections. At this stage, the Court would also be required to see that what are the stakes. Stakes, in the present case, are total liabilities of Core. If the total liabilities are worth Rs. 1800 crores and the creditors who have to recover to the tune of more than Rs. 1700 crores are agreeable to make sacrifice, then simply because some people or some financial institutions/banks do not accept such Scheme, the Scheme cannot be sacrificed. At this stage, I am assuming that face value of the right to recover is to be taken into consideration. Under the circumstances, the objections cannot be allowed.

31. So far as the judgments of the Supreme Court reported in the case of ***Dr. Renuka Datla [Mrs.] v. Solvay Pharmaceuticals B.V. And others***, [***(2004) 1 SCC 149***] and in the case of ***Rajasthan State Financial Corpn. v. Official Liquidator and anr.***, [***(2005) 8 SCC 190***] are concerned, those were on different facts. The said cases related to winding up. In the said cases, the Court held that before disposing of the property, High Court would be entitled to obtain fresh valuation report. The said decisions have no bearing on the present matter, because Core is not in winding up. If majority shareholders and the majority of the lenders are of the opinion that particular decision should be taken to receive best of the benefits and avoid delay, then further valuation report is not necessary.

32. So far as the respondents' objection regarding transfer of funds to subsidiaries by giving interest free loans is concerned, in the opinion of this Court, the objection cannot be considered in these proceedings. The act of the Board of Directors or the management of Core have nothing

to do with the present Scheme. It is also to be noted that Core is not amalgamated in Nirma nor is in winding up. If ultimately it is found that the Board of Directors, Managing Director or Director or the management of Core is guilty of an act of commission or omission, misfeasance or malfeasance, then it could certainly be brought before the Court, their liability under the law would continue. In the matter of ***Arvind Mills Ltd. [111 Company Cases 118]***, the Court held as under:

> *"One of the arguments advanced on behalf of the objectors is that the past conduct/transactions of the company would disentitle approval of the scheme. As far as provisions contained in section 391 and section 394 are concerned the past conduct would be hardly relevant for the purpose of the approval of the arrangement. In the case of scheme of restructuring the company concerned would very much remain as legal entity and would continue to function. Past transactions would be relevant or required to be seen in cases of amalgamation of the company where the transferor-company merges into the transferee company. Section 391 does not contemplate or require that the past events be reflected in the scheme*

document. The past events cannot be a disqualification as far as approval of the scheme of restructuring is concerned. It is only because the financial difficulties experienced/undergone by the company and the debt mounting over the company the scheme of restructuring is necessitated, so that the company can survive and the creditors may also get their dues with some sacrifice on their part depending upon the resources available to the company and the object behind the exercise of restructuring is that the employees of the company may not starve and putting the company on a sound financial footing to serve the interest of all concerned under the circumstances. It may also be seen that what is sought to be approved/sanctioned is the scheme of restructuring of debt and not the past conduct. Suffice it to say that the past conduct is not relevant for consideration of the scheme of restructuring of the debt."

The Hon'ble Court while sanctioning the Scheme in the case of Arvind Mills [supra] observed as under:-

"However, it is wished to be clear that the sanction of the scheme is subject to the criminal prosecution for the alleged acts of misfeasance and/or malfeasance

[past transactions] for which criminal complaint has been pending before the criminal court, and the issue of past transaction is kept open to be adjudicated in appropriate proceedings, civil as well as criminal, by the appropriate court [Ratnamani Engineering Ltd., In re [1999] 33 CLA 358 [Guj] and the scheme deserves to be sanctioned subject to and without prejudice to the liability if any, in the civil and criminal proceedings in respect of past transactions.

The sanction is hereby accordingly accorded to the scheme of compromise and arrangement and restructuring of the debt of the petitioner-company, copy whereof is annexure D to the petition. This Court hereby accords sanction to restructuring of the debt of the petitioner-company as envisaged in the scheme annexure D, subject to and without prejudice to the liability if any, in the civil and criminal proceedings in respect of past transactions."

33. From this judgment, it would be clear that the Scheme can always be sanctioned subject to and without prejudice to the liability, if any, in the civil and criminal proceedings in respect of the past

transactions. The argument of objectors that the Scheme is vague and incomprehensible should not detain this Court unnecessarily because the Scheme is clear, nobody either raised an objection in the meetings held for the purpose or at the time of the discussion that the Scheme was vague and incomprehensible. The liability, if any, of the Board, Directors, management etc., in civil and criminal proceedings would continue, and I accordingly so order.

34. One of the objections raised by the objectors is that the present Scheme was conceived in deceit and delivered in fraud as a result of conspiracy amongst Core, Nirma and ARCIL. So far as the allegation of conspiracy is concerned, this Court is unable to accept the said argument. ARCIL and other banks, in the opinion of this Court, would not become party to a conspiracy. After all, the ARCIL if disowns its recoveries then it is also answerable to the public/companies/financial institutions. Nirma, if is to receive some benefits and such benefits would come in its favour because of the

provisions in the Statute, then it cannot be said that they are playing fraud. So far as Core is concerned, it would not be possible to say that they would be benefited by grant or sanction of the Scheme. Core had already lost possession of its property as the assets are taken over by ARCIL and Directors/Board of Directors or the management of Core had no say in the day-to-day management of the property. I would agree with the petitioners that the Scheme of demerger is a matter of contract between the parties and agreement to the terms of the contract and if agreeing with the terms, they entered into contract because each of them had identical minds or is taking up identical position, then it would be right to say that there can be no Scheme or agreement unless the parties to the contract agree to the Scheme.

35. It is not in dispute before me that ARCIL invited bids for transfer of assets of Core and in response to such invitation, Nirma alone submitted its offer. Any person interested in purchase of the property did not come forward nor made any offer. If

Nirma had responded to the advertisement, then there was no wrong in it. Nirma did not come into picture before advertisement was published by the ARCIL which proposed to sell the property. If in response to the advertisement, Nirma submitted its offer, then it would not be possible to say that Nirma entered into collusion or conspiracy with ARCIL. ARCIL, after having purchased the debts would step into the shoes of the lender and there cannot be a collusion between the creditor and debtor. In fact, some of the lenders who had assigned their debt to ARCIL had filed a suit before the Debt Recovery Tribunal for recovery of their debts. Once ARCIL had taken an action under the SARFAESI Act and took over possession of the assets of Core, then it was mandatory for BIFR to terminate the proceedings. If this is statutory legal position, then any action on the part of the trio, namely ARCIL, Core and Nirma, cannot be termed as conspiracy or collusion.

36. The objection of the objector in relation to Section 13 of the SARFAESI Act is that assets of Core were not valued nor any reserve price was fixed

as was required under the rules framed under the said Act. It is also submitted by the objectors that under Section 35 of the Act, Scheme proceedings are not maintainable. Section 13 of the said Act reads as under:

> *"13. Enforcement of security interest.—[1] Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 [4 of 1882], any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.*
>
> *[2] Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section [4].*

[3] The notice referred to in sub-section [2] shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

[3A] If, on receipt of the notice under sub-section –[2], the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

[4] In case the borrower fails to discharge his liability in full within the period specified in sub-section [2], the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

[a] take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing secured asset;
[b] take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of th3e business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;

[c] appoint any person [hereafter referred to as the manager], to manage the secured assets the possession of which has been taken over by the secured creditor;

[d] require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

[5] Any payment made by any person referred to in clause [d] of sub-section[4] to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

[6] Any transfer of secured asset after taking possession thereof or take over of management under sub-section [4], by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

[7] Where any action has been taken against a borrower under the provisions of sub-section[4], all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

[8] If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor or at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

[9] In the case of financing of a financial asset by more than one secured creditors or

joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section [4] unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act,1956 [1 of 1956]:

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realize his security instead of relinquishing his security and proving his debt under proviso to sub-section[1] of section 529 of the Companies Act, 1956 [1 of 1956], may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 [1 of 1956] and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.—For the purpose of this sub-section,--
[a] "record date" means the date agreed

upon by the secured creditor representing not less than three-fourth in value of the amount outstanding on such date;

[b] "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

[10] Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

[11] Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses [a] to [d] of sub-section [4] in relation to the secured assets under this Act.

[12] The rights of a secured creditor under this Act may be exercised by one or more of his officers authorized in this behalf in such manner as may be prescribed.

[13] No borrower shall, after receipt of notice referred to in sub-section [2] transfer by way of sale, lease or otherwise [other than in the ordinary course of his business] any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

37. I had specifically asked the learned counsel for the respondents that who would continue to be the owner of the property even if possession is taken by ARCIL under the provisions of the SARFAESI Act, learned counsel for the objector in their fairness submitted that right to manage the property and sell the same would accrue in favour of ARCIL but the property would continue to belong to Core.

38. Once it is held that the property in dispute belongs to Core till its disposal by ARCIL and appropriation of the receipts and continues to be in the ownership of and belongs to the

debtor/company and on sale of the property, company would be discharged to the extent of some or full liability, then it cannot be argued that the company would not be entitled to proceed in the matter. In a given case, ARCIL may sell the property after obtaining valuation report or in a given case, if it already has valuation report, then, it can offer property in the market and may book profits. ARCIL, after taking possession of the property, on one side represents interest of the lenders and at the same time takes care of the interest of the borrowers, i.e. the company. Any action of the ARCIL, if is bad, then, it can be challenged before the Court of law at the instance of the lender or borrower. ARCIL does not become absolute owner of the property, but simply acquires certain rights under the Act in regard to selling the property and distributing the receipts. Present proceedings are under Sections 391 to 394 of the Act. There is no sale of assets nor part of the undertaking under the SARFAESI Act and if there is no sale of assets, then question of valuation, fixation of reserve price, authority of ARCIL to sell the property under the Act and the

Rules framed thereunder would not arise. Even otherwise, it is to be noted that report of Ernst & Young is available on the record, was available with ARCIL and they had invited public offers for disposal of the property. If Nirma was the only company to make its offer then, ARCIL could sell the property in favour of Nirma or could allow Core to float the Scheme for demerger so that in terms of Scheme, the property is demerged with Nirma for the same value which ARCIL was to receive otherwise. Present is not a case where anybody says that report of M/s.Ernst & Young is wrong report or Nirma was not the sole offerer or somebody had come forward to make better offer, or even the objectors have somebody with better offer. If offer made by Nirma continues to be the same and the property stands demerged in favour of Nirma, then purpose of SARFAESI Act is achieved because after the property of the defaulter company is sold the receipts are to be distributed amongst the lenders and different classes. So far as Section 35 of the SARFAESI Act is concerned, the said provision would come into force if it is held that the Scheme under the provisions of

the Companies Act contained anything inconsistent with the SARFAESI Act. Sections 391 to 394, in the present set of circumstances and even otherwise are in no way inconsistent with the SARFAESI Act. Section 13 of the SARFAESI Act deals with disposal of the property by its management or sale, while the Scheme floated under Sections 391 to 394 also deals with disposal of the property by way of some arrangement or demerger. If ultimately, goals to be achieved under the different Acts are the same, then it cannot be argued that provisions run contrary to each other and those are inconsistent with each other. Section 37 of the SARFAESI Act provides that provisions of SARFAESI Act are in addition and not in derogation of the Act. A fair understanding of Section 37 would make it clear that provisions of floating a Scheme under Sections 391 to 394 would be in addition to power to sell the property and would not be taken to be contrary to the authority to sell the property.

39. Provisions of the SARFAESI Act provide that after a borrower had received a notice under Section 13[2] of the SARFAESI Act, he would stand injuncted

from selling or transferring the secured assets without prior written consent of the secured creditor. I would readily agree with the petitioner that the Scheme under Sections 391 to 394 of the Act, if is sanctioned, it would amount to consent by the secured creditors for transfer of the assets, because the Scheme postulates/proposes transfer by demerger. Even otherwise, it is also clear that Section 13[8] of the SARFAESI Act clearly provides that the borrower would be entitled to redeem the mortgaged property before the same is sold on payment of the amount due. Once the Scheme is sanctioned and the amount as proposed under the Scheme is paid either by the borrower or on behalf of the borrower, the property in dispute would stand redeemed in favour of the borrower or in favour of the person who pays money under the Scheme. Taking into consideration the legal provisions and totality of the circumstances, I am unable to hold that the proposal and consideration of the Scheme under Sections 391 to 394 would run contrary to Section 13 of the SARFAESI Act and this Court would have no jurisdiction to grant or approve such Scheme.

40. One of the objections raised by the objectors is that the objectors have filed their case before the Debt Recovery Tribunal, therefore, this Court would have no jurisdiction to consider the Scheme and by grant of the Scheme as the objectors are to be non-suited by the Debt Recovery Tribunal, present proceedings are illegal. The petitioners have placed their reliance upon the judgment of the Supreme Court in the matter of ***Allahabad Bank v. Canara Bank and another***, [***AIR 2000 SC 1535***]. So far as the right of the objector to proceed with the case before the Debt Recovery Tribunal is concerned, it would certainly stand if the Scheme proceedings are not approved by the High Court. Core certainly would have a right to take out proceedings for compromise. If the proceedings ultimately fail and the Scheme is not approved by the High Court, then right to proceed with the proceedings before the Debt Recovery Tribunal would stand, but it cannot be said by any stretch of imagination that Scheme proceedings cannot be approved by the High Court in view of pendency of the proceedings before the Debt Recovery Tribunal.

The right to recover through agency of Debt Recovery Tribunal is a statutory right and at the same time, right to get any Scheme approved is also a statutory right under the Companies Act. If no proceedings are taken for the Scheme or its finalization, then, the Debt Recovery Tribunal can proceed with the matter and at the same time, under the SARFAESI Act, ARCIL would be entitled to sell the property. I presume a case where a matter is pending before the Debt Recovery Tribunal and at the same time, ARCIL, exercising its rights under the SARFAESI Act sells the entire property of the Company. After sale proceeds are received would the property be distributed amongst the lenders in accordance with their rights, i.e. proportionate ratio or in accordance with the decrees granted either by the Debt Recovery Tribunal or by some Court or by High Court in some other proceedings. If action of the ARCIL in disposing of the property cannot be condemned and despite decree by Debt Recovery Tribunal, sale proceeds are to be distributed amongst the lenders, that too, *pari passu* or in proportion, then pendency of the proceedings before the Debt

Recovery Tribunal would not come in the way of the High Court in approving/sanctioning the Scheme. The moment a Scheme is finalized, approved and sanctioned by the High Court, the Scheme would become final and the lenders, whether Class-A or Class-B, secured or unsecured, statutory bodies, shareholders, promoters etc. would be bound by the said Scheme and their right to recover would stand crystallized under the sanctioned scheme. Sections 391 to 394 do not say that the Scheme would be binding upon some only. In fact, the Scheme proceedings bind all persons who are associated with and are interested in the Company, whether they are promoters, shareholders, lenders, employees, workmen. If the High Court approves a Scheme for restructuring or revival of the company and it directs that such company be restructured in its finances or capital or by reduction of share capital or by disposal of the property, then the Scheme would be binding upon all concerned. If the Scheme is approved and the property is sold or is allowed to demerge, then that Scheme would be final and would have a binding effect on all concerned, and once the Scheme binds objectors, then

they would not be allowed to say that despite approval of the Scheme by the High Court, they would be entitled to proceed in the Debt Recovery Tribunal. Judgment in the matter of ***Allahabad Bank*** [*supra*] was in altogether different context, there, the Supreme Court was not considering approval, sanction or rejection of the Scheme. It cannot be denied that in a pending litigation, a borrower can come forward for settlement and it would always be open to the lender to accept the terms of the settlement. If such authority is available to a borrower, then he can always come forward with a Scheme for compromise which is being offered to the creditors individually so also jointly. However, I would agree with the petitioner that if an individual lender can settle, then, there is no reason to to hold that the lenders collectively cannot enter into the Scheme of compromise.

41. In the matter of ***Arvind Mills Limited*** [*supra*], the High Court has observed as under:

> *"There is no denying the fact that if the scheme is approved the objectors would not be able to get a money decree against the*

company. At the same time the objectors would l get their dues as per the terms of the scheme as offered to other secured creditors, but because the objectors have filed a suit in the English court, that cannot deprive the other secured creditors of the benefits under the scheme when they have floated and supported the scheme. Pages 392 to 403 of File-I is the copy of the plaint filed in the English court. As far as the reliefs claimed in the suit pending before the court in England against ICICI and the company are concerned, consideration of the scheme cannot come in the way of grant of relief of declaration prayed in para 30[a] and [b] thereof if the English court is inclined to grant the same against the company. The relief of declaration sought against the company in the suit before the English court will remain irrespective of the sanctioning, if any, of the scheme, as the scheme is to be considered under the provisions of sub-sections [1] and [2] of section 391 of the Act. In my opinion, filing of the aforesaid suit by some of the objectors and pendency of the same before the court in England cannot come in the way of considering the scheme by this court as it is the body of the creditors which has floated and supported the scheme with a view to protect

its own interest coupled with the intention that the company be put on sound financial footing, so that all creditors can have their dues, though with some sacrifice on their part keeping in view the long-term benefits accepting the scheme to be commercially viable, exercising their commercial wisdom."

It is also an argument of the objector that ARCIL would have no right to vote at both the meetings of lenders or if it had any right of voting, then value of its vote should have been reduced to the price at which the debt is assigned to it and not to the value of the debt which has been assigned in its favour. I have already referred to the arguments of the parties in detail. The argument in fact, is that if ARCIL had purchased right to recover the debt at much low a price than its face value, then according to the objectors, the value at which ARCIL had purchased the debt should be the value of ARCIL's right and not the right on its face value which has been purchased at much low a price. The objection further is that ARCIL not being the lender would not be entitled to vote at all. I will take up

the objections one by one. It is undisputed that five lenders of Class-A and one lender of Class-B had assigned their debt to ARCIL under the provisions of the SARFAESI Act. It is undisputed that on receipt of smaller amount by lending banks, they had assigned their right in favour of ARCIL. Neither the Companies Act nor the SARFAESI Act nor the Contract Act nor the Sale of Goods Act provide that if right to recover debt is purchased at a lower price, the right to recover would stand reduced to the price paid for acquiring the rights. In the present matter, undisputedly, ARCIL had paid lower price for acquiring greater right but if a person voluntarily without any pressure, duress or coercion taking into consideration the hard realities of life, sells his property at a lower price, then the law does not stop him from doing so. Any person who purchases valuable property for a lower price and element of fraud or dishonesty is not associated with it, then he becomes absolute owner of the right purchased by him. In case, property was to be sold by ARCIL under the provisions of the SARFAESI Act, could objectors say that there money should be paid to them in full

and ARCIL be paid in proportion to the money which they have paid to purchase the entire right. If the SARFAESI Act does not provide for such bar nor creates any ban against any lender, to say, that ARCIL would not be entitled to recover full money, then in these proceedings, one cannot be allowed to say that ARCIL purchased the right of greater value but lower price was paid, therefore, value of the purchased or assigned right should be reduced proportionately taking into consideration the price paid by the purchaser.

42. It is also undisputed fact that assignment of the debt has already been registered in the office of the Registrar of Companies. It cannot be gainsaid that ARCIL does not step into the shoes of the lender and it cannot be deemed to be lender for all purposes and does not acquire all the rights of the secured lender. In fact, all the rights of secured lender or financial institution would vest in ARCIL.

43. Section 5 of the SARFAESI Act reads as under:

"5. Acquisition of rights or interest in financial assets.- [1] Notwithstanding anything contained in any agreement or any other law for the time being in force, any securitization company or reconstruction company may acquire financial assets of any bank or financial institution--

[a] by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or

[b] by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

[2] If the bank or financial institution is a lender in relation to any financial assets acquired under sub-section [1] by the securitization company or the reconstruction company, such securitization company or reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such ;bank or financial institution shall vest in such

company in relation to such financial assets.

[3] Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers-of-attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise and other instruments or whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset under sub-section [1] and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the securitization company or reconstruction company, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, securitization company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of securitization company or reconstruction company, as the case may be.

[4] If, on the date of acquisition of financial asset under sub-section [1], any suit, appeal or other proceeding of whatever nature relating to the said financial asset s pending by or against the bank or financial institution, save as provided in the third proviso to sub-section [1] of section15 of the Sick Industrial Companies [Special Provisions] Act, 1985 [1 of 1986] the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the securitization company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the securitization company or reconstruction company, as the case may be."

If debts were not assigned in favour of ARCIL, then, each of the assignor, that is, lender bank would have been entitled to take part in the meeting and project its views and the amount which it was entitled to recover from Core was to be given its true value, then, why representative of such lending institution/bank or purchaser from such lending institution/bank would not be entitled to take part in the meeting. ARCIL as assignee having acquired absolute rights of a lender will be entitled

to attend the meeting.

44. The submission of objectors is that there is conflict of interest between ARCIL and other lenders. Objection, in fact, is that the objectors having not agreed to the Scheme would be entitled to recover in full while ARCIL having purchased the property at a lower price would be entitled to recover the price which it had paid to the lending institution. The argument is absolutely misconceived. If statutorily required majority agrees to the Scheme and the High Court sanctions the same, then irrespective of the objection by the dissenting parties, the Scheme would bind them. Any objector would be entitled to raise objection in the meeting and if majority marches over them, then it would not be coercion by majority over minority, the minority will have to surrender to the wishes of the majority. Present is not a case where two objectors would be losing everything. Two objectors would immediately be receiving some money instead of awaiting final disposal of the company, winding up, results of the civil suits or DRT proceedings. If wisdom prevails upon many of the

lenders to enter into compromise or arrangement or agreement, then, the said wisdom cannot be termed as mala fide or foolish, because some objected to such Scheme. If the majority wants that particular action should be taken immediately, then minority except in cases of fraud or commercial foolishness will have to accept the view of the majority.

45. ARCIL, undisputedly, has paid lower price for purchasing greater rights, but, what it has purchased is the right and the right enforceable against the company. If somebody purchases a fortune for song's price, then, he would be entitled to fortune and would also be entitled to recover market price of the fortune and none can say that he is required to sell the said fortune for the song's price. The conflict as projected by the objectors appears to be artificial. If the lenders are of the same Class, then conflict must be real. The objectors cannot say that though they are lenders of money, they are secured creditors of Class 'A' or Class 'B', but, they are absolutely different class, because they do not agree with what the majority says. In a

given case, if the property was to be sold by the High Court in winding up or liquidation proceedings, then purchaser of the rights, i.e. ARCIL would be entitled to recover what it had purchased and not what it had paid to purchase the rights. If in such proceedings, the objectors would be taken to be the lenders of the same Class or birds of the same block, then in these proceedings or in the meeting, they cannot be treated to be different class of lenders. In the present case, all the lenders had a solitary object, that is to realize dues, maximum recovery in minimum time. The argument that the lenders in view of their unchanged position would be taken to be class in itself would also be bad, as no lender can be put in identical position because, amount of loan is different, rate of interest is different, repayment period is different or in a given case, some extra or additional benefits are offered by the lending bank. If this objection put forth by the objectors is accepted, then, a Scheme of compromise or arrangement would never be approved, because each lender would be a different entity and a Class in itself and if one only opposes or the

minority having very small stake opposes the Scheme, then the Scheme cannot be approved. Such is not the intention of the legislature. It is also to be seen that the price paid to acquire right would not be criteria but in fact, face value of the right would be the criteria. In a given case, a shareholder might have purchased the share for Rs.10/- and the other at Rs.100/-. If payment of the price is to be taken as criteria to create a different class, then, shareholders amongst themselves would create different classes and it would lead to an impossible situation. In a case where, after discharge of the liabilities, the Company Court in liquidation proceedings proposes to pay money to the shareholders, then it would pay the face value and not the purchase price. Similar would be a case where greater right or larger right is purchased for a lower price. In a given case, transferable/actionable claim may be transferred at a lower price because the holder of the right does not wish to waste his property, time and peace of mind by entering into litigation. If he feels happy and content by receiving lower price then, negotiations of price

between the seller and purchaser would be a concluded contract between them, but that would not absolve the debtor and allow him to come the Court and say that the lender had parted with his right for a lower price, therefore, to the extent of the rest borrower is absolved. If in this case, the borrower has to pay full money to the purchaser of the claim then any other lender cannot come forward and say that purchaser of the right to recover would not be entitled to exercise his absolute rights for recovering the money.

46. The question of creation of the class will have to be seen from other angle that whether formation of the Class provides some advantages or disadvantages to the persons of same Class. It should be seen on the touchstone of the equity that whether the Scheme would affect everybody identically. The word “identical” here would not mean in terms of money but it will have to be seen that if somebody is making a sacrifice to the tune of 50%, then everybody should make sacrifice to the tune of 50%. In the present case, classification of creditors has to be

on the basis of the terms offered to them under the Scheme and not on any other basis. It would be correct to say that ARCIL had purchased the debt at much lesser price and would therefore, suffer lesser in comparison to objectors but under the law it would have no bearing upon the Scheme proceedings.

47. In the present case, if the lending banks could sell their right to recover money, then, they could also enter into agreement with Core to settle their dues for the amount which was offered to them by ARCIL. If such settlement could be entered into between Core and lending banks, then, Core would have been benefited to the extent of full debt and not to the extent of price paid for the settlement. If Core is to be benefited to the extent of full, then any purchaser of the right would also be entitled to the benefit to the full extent. Under the law, lender would not be entitled to presume that interest is definite. Perception of such lender or presumption in its favour or any *ipsi dixit* of a lender would not change the legal position. In fact, perception of one lender would not prevent other lenders from

considering interest of all concerned.

48. At this stage, I am tempted to refer a judgement of the Supreme Court reported in ***JT 2006 (9) SC 585*** in the matter of ***All India ITDC Workers Union & Ors. vs. ITDC & Ors***. In the said matter, the Government declared a disinvestment policy. Under the said policy, the Government issued an advertisement for outright sale of six hotels and long term lease for two hotels. The property of ITDC was demerged in the name of the new company with the approval of the Company Law Board. The matter came up before the Supreme Court on a challenge to the disinvestment policy and sale of the property by demerger. The Supreme Court observed that ITDC or the Government could direct sale of the property and could adopt the policy of disinvestment. The Supreme Court observed that the demerger was approved by the Company Law Board and it was clear from the demerger scheme that all the liabilities relating to the transferred undertaking upto the date of the transfer were taken over and were to be discharged by the transferee. Referring to the specific question, the Supreme Court

observed that the transferee would be liable to pay all the liabilities and dues to the employees on the same terms and conditions of service, which were applicable to the employees in the hotel.

48.1 The Supreme Court also observed that the demerger of the hotel union from ITDC was a considered opinion taken by the Cabinet Committee on disinvestment and had the approval of the Department of Company Affairs in terms of the Act. The Supreme Court also found that by an order made by the Department of Company Affairs, on 4th October, 2001, ITDC was directed to convene a meeting of the creditors of Hotel Agra Ashok for the purpose of considering and if thought fit approving with or without modifications, the scheme. A meeting was held on 30th October, 2001 and the Chairman of the said meeting directly reported the result of the meeting to the Department of Company Affairs. On 26th December, 2001, a direct petition was filed with the Department of Company Affairs under Section 391 of the Act for approval of the new scheme of agreement between ITDC and Hotel Yamuna View Private Limited

and their respective shareholders for Hotel Agra Ashok. Public Notices were directed to be issued regarding the scheme of arrangement and hearing through advertisement. After hearing the parties, the Department of Company Affairs gave approval to the scheme of agreement on 1st February, 2002. The demerger was complete on 1st February, 2002 and only thereafter, the shares of the Government of India in Hotel Yamuna Private Limited were sold to respondent No.5 on 7th February, 2002 by the share purchase agreement.

48.2 The Supreme Court also observed that a policy decision should be least interfered in judicial review because the policy decision or the final verdict in the meeting would reflect the general consensus.

48.3 This judgement of the Supreme Court gives an appropriate reply to the objectors' objections that demerger is not permissible under Sections 391 and 394 of the Act and the Court can interfere in the matter if the majority is trying to give rough shod

to the minority.

49. In the present matter, ARCIL, the biggest creditor, and other purchasers of the debts, have already approved the scheme. The shareholders, Class 'A' lenders and Class 'B' lenders have already approved the scheme. If any scheme is approved by the shareholders, then, virtually, the shareholders are taking a policy decision subject to approval of the scheme by the lenders of Class 'A' or Class 'B', whose interest may be adversely affected by the resolution passed by the shareholders. After application of mind and taking all pros and cons into consideration, if the lenders approved the scheme, then, such a scheme would be an outcome of the policy and would reflect the commercial wisdom of the persons, who are interested in the company or in the loans which they had advanced to the company. The objections raised by the objectors that demerger is not permissible under Sections 391 and 394 of the Act, does not merit.

50. In the matter of ***Mafatlal Industries***

Limited, In re [***87 Comp.Cases 705***], this High Court has observed as under:

> *"In our opinion, a plain reading of a section does not leave any doubt that only where separate terms are offered to separate classes of shareholders or creditors under the proposed compromise or arrangement, separate meetings are required to be held in respect of each class of creditors or shareholders for whom separate compromise or arrangement has been offered. Otherwise, the use of the phrase 'as the case may be' in sub-section (1) for the purpose of holding separate meetings and in sub-section (2) of section 391 of the Act for the purpose of agreeing with the proposed scheme by requisite majority and its binding effect on being sanctioned by the court, would be superfluous. If in any given case, whether the compromise or arrangement has been proposed between the company and the creditors as a whole without conferring or spelling out different terms for different classes of creditors or between the company and its members as a whole without giving any separate package for different class of members, separate meetings of different classes of members required to be held the phrase 'as the case may be' for the purpose of ordering a meeting of creditors or a class of creditors or of the members or class of members or the requirement of a majority representing*

the requisite value of creditors or class of creditors or members or a class of members, as the case may be, would carry no meaning. Whatever may be the case, if the contention of learned counsel for the objector is to be accepted, whether the compromise is one confined to a class of members or to a body of members as a whole would make no difference and in each case, a separate meeting will have to be called for only a class of members irrespective of the fact whether the scheme affects the class differently or not. Or in a given case no compromise or term is offered to a particular class of shares but may be confined to one or more than a class of shares. Therefore, before adverting to the question whether the appellant-objector constitutes a separate class of shareholders or not, it has to be seen whether any different terms have been offered to different classes of creditors or members and whether any classification of members is required to be made in accordance with those distinctions in terms of the compromise offered to them and whether any such separate meeting was required to be called. The classification of members or creditors will be founded on the basis of the difference in the terms offered under the scheme. The difference in terms of the scheme can be the only criterion for identifying the separate class for the purpose of convening a separate meeting for such class.

It is not even the case of the shareholder-objector that any different terms have been offered to persons holding shares affected by the family arrangement or otherwise. In fact, the entire proposal is one affecting in a like manner all the existing shareholders of the petitioner company, namely, that under the proposed scheme M. Fine shall be amalgamated with MIL and in consideration of such amalgamation with the petitioner company, the petitioner company shall make the members of the transferor company participants in its share capital by issuing two shares of MIL in lieu of five shares of M. Fine to the members of M. Fine or in substance the business of M. Fine shall be acquired by MIL for consideration which is equal to the conversion of five equity shares of the transferor company to two equity shares of the transferee company. That is to say, instead of paying cash to the transferor company, the consideration shall be paid in terms of issue of share capital to the members of the transferor company directly in the aforesaid ratio. That will be so because on amalgamation, the transferor company, M.Fine, shall cease to exist. We have not been able to apprehend how these terms operate distinctly or differently for one shareholder from another shareholder of MIL vis-a-vis the interest/rights of the company and its shareholder. Whatever may be the

personal interest of the individual shareholder may affect pattern of voting. If the personal interest of the shareholder or personal ambitions of the individual shareholder constitute a different interest requiring separate classification then each shareholder irrespective of the terms of the scheme would constitute a class by himself, because the interest of each shareholder in that sense would be different from others and such interest would be affected differently on the scheme being approved and implemented. The fact that the petitioner-objector and other members of the Mafatlal family are holding a substantially large number of shares which hithertofore were controlling MIL because they were acting in unison having now fallen apart and having their interest in conflict with each other is wholly irrelevant for the purpose of conferring the status of distinct class to any such member so long as under the scheme they are not treated differently. Any other view will lead to strange and chaotic results. Ought one to know that who stand today apart may be united tomorrow and vice versa, those in conflict may unite. If such interest simpliciter were to be the relevant consideration for treating them as a separate class, any private dispute between joint shareholders or groups of shareholders about distribution of a legacy would result in conferring the distinction of a separate class

on each of the contesting claimants. That, in our opinion, has no place in the scheme of provisions. The class of creditors or members envisaged under section 391 is directly related to interrelationship between the company and the shareholder on the basis of rights and obligations attached to the class of shares issued and such rights being affected by the proposed scheme of arrangement or compromise differently and not personal rights of the holders of shares emanating from their right of inheritance or personal contracts between themselves. Who is on the board of a company or is in the driver's seat in controlling the affairs of a company is not a part of the proposed scheme or no special rights are attached to any shareholder, but is a result of democratic functioning of the body of shareholders electing its board.

What constitutes a class of members or a class of creditors, in the context of the provisions of section 391 of the Act, is not defined under the statute. But, as discussed above, it is obvious from the scheme of provision itself that, in order to be treated as a separate class of members or creditors claiming a right to hold a separate meeting for the purpose of approving the proposed compromise scheme of arrangement by requisite majority, it must be such which is to be treated differently under the scheme in its

implementation or intended effect of the scheme or such interest.

In Palmer's Company Law, 24th Edition, the principle, which is germane for constituting a separate class of members or creditors requiring a meeting in pursuance of the directions of the court under the English law, has been enunciated thus:

> *'What constitutes a class:*
> *The Court does not itself consider at this point what classes of creditors or members should be made parties to the scheme. This is for the Company to decide, in accordance with what the scheme purports to achieve. The application for an order for meetings is a preliminary step, the applicant taking the risk that the classes which are fixed by the Judge, unusually on the applicant's request, are sufficient for the ultimate purpose of the Section, the risk being that if in the result, and we emphasis the words 'in the result' they reveal inadequacies, the scheme will not be approved'. If, e.g., rights of ordinary shareholders are to be altered, but those of preference shares are not touched, a meeting of ordinary shareholders will be necessary but not of preference shareholders. If there are different groups within a class the interests of which are different from the rest of the class, or*

which are to be treated differently under the Scheme, such groups must be treated as separate classes for the purpose of the scheme. Moreover, when the company has decided what classes are necessary parties to the scheme, it may happen that one class will consist of a small number of persons who will all be willing to be bound by the scheme. In that case, it is not the practice to hold a meeting of that class, but to make the class a party to the scheme and to obtain the consent of all its members to be bound. It is, however, necessary for at least one class meeting to be held in order to give the Court jurisdiction under the Section.'

From the aforesaid, it is clear that what is the primary importance for the purpose of constituting a class requiring a separate meeting thereof, is different treatment given to a group under the proposed scheme. No separate classification is required until a group is treated differently under the scheme. The illustration clarifies the position transparently that where rights of ordinary shareholders are to be altered but those of preference shares are not touched, a meeting of ordinary shareholders alone is required but not of preference shareholders. If amongst the ordinary shareholders, some group is to be

treated differently than the other group, that too, within the class of ordinary shareholders, a separate meeting may have to be held for the purpose of binding different interest which are treated differently under the scheme. The term of 'any interest treated differently under the scheme' is important. The fact that the shareholders-members of the same class, offered the same terms under the scheme perceive their interest differently or consider that their interest may be affected differently from others because of their interrelationship or their interests other than as shareholder simpliciter, cannot sustain their claim to constitute a class distinct from others. Such interest is to be taken care of by way of expressing their views and voting during the course of the meeting. If that were not so, all interests would be identical and if anybody has any interest apart from being treated differently under the scheme, likely to be affected in different manner because of the personal circumstance of the holder of shares or creditor, as the case may be, on account of consequences of the scheme but not on account of the terms of treatment under the scheme, would lead to the whole provisions being unworkable inasmuch as every person claiming his interest to be adversely affected by the proposed scheme on that account will have to be treated differently resulting in classification of groups having identical

interest and identical response to the scheme.

A great deal of reliance was placed by the learned Counsel for the appellant on two judgements in the cases of Sovereign Life Assurance Co. vs. Dodd [1892] 2 QB 573 (CA) and Hellenic and General Trust Limited, In re [1976] 1 WLR 123.

However a close reading of the two judgements, in our opinion, does not lead to a different conclusion, rather it fortifies the conclusion which we have reached.

In Sovereign Life Assurance Co. v. Dodd [1892] 2 QB 573 (CA), Mr. Dodd had taken two policies of life insurance against his own life from the company according to which if Mr. Dodd was alive on the date, namely, May 7, 1888, the date of maturity, they would pay the money assured to Mr. Dodd. Mr. Dodd had paid all premia payable by him. He had also obtained two separate loans against each policy from the company. During this period, a petition for winding up of the company was presented. During the pendency of that winding up petition, the policy matured and the amount became payable under that policy to the assured, which was not paid to Mr. Dodd. After the policies have become matured and the claims under them and had crystallised in July, 1889, in the first

instance, the winding up order was made, and thereafter an arrangement under the Joint Stock Companies Arrangement Act, 1870, was entered into between the plaintiff-company and another company under which it was agreed that the plaintiff-company shall be transferred to another company in lieu thereof, all the holders of the policies shall accept certain reduced payments from the transferee company which was approved by a majority of shareholders. Mr. Dodd did not assent to the arrangement. After the scheme was sanctioned, the plaintiff-company had filed a suit against Mr. Dodd for recovery of the two loans raised against the two policies taken out by him. In defence, Mr. Dodd claimed full amount payable under the policy as set off which but for winding up would have been payable to him upon the policies. The plaintiff-company put forward the said arrangement to negative the claim of set off. It is under these circumstances when the matter reached the Court of Appeal, Bowen J., in his judgement concurring with Lord Esher M.R., stated thus (at page 583):

'If we are to construe the section as it suggested on behalf of the plaintiffs it ought to be construed we should be holding that a class of policy holders whose interests are uncertain may by a mere majority in value override the interest of those who have nothing to do with futurity, and whose rights have been

already ascertained. It is obvious that these two sets of interests are inconsistent, and that those whose policies are still current are deeply interested in sacrificing the interests of those whose policies have matured. They are bound by no community of interest, and their claims are not capable of being ascertained by any common system of valuation. Are we, then, justified in so construing the Act of Parliament as to include these persons in one class? The word 'class' is vague, and to find out what is meant by it, we must look at the scope of the section, which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'

It would be apparent from the aforesaid principle as applied to the facts of the case before the Court of Appeal, that the court clearly spelt out dissimilarity of interest vis-a-vis the scheme as existed between the holders of the policy then current requiring payment on a future date of maturity, valuation of which could not be fairly ascertained on that date and

the interest of holders of policies, which on amalgamation have already been ascertained. Therefore, the two sets of claims were quite dissimilar on the date when the arrangement was being considered vis-a-vis their rights against the company. Therefore, it became necessary to decide whether the scheme and arrangement proposed is fair and reasonable from ordinary business point of view. It was considered to be unreasonable that by calling a joint meeting of shareholders an unfair advantage was offered to the majority to the value, namely, those whose rights have not been ascertained to override the interest of the minority whose rights already stood ascertained against the liquidator of the company. It is apparent that classification of creditors into two classes, namely, holders of the policies that have been matured and holders of policies that are current are held to have an adverse effect directly as a result of the scheme on their respective interests because of the state of the things existing on the date of calling of the meeting in relation to rights and liabilities vis-a-vis the company."

50.1 From this judgement, it would clearly appear that there is a marked distinction between the phrases, "rights" and "interest" of persons, who have identical rights. From this judgement, it would also

be clear that persons having identical rights should be treated in identical manner and must be placed in the same class. All the shareholders whether they have purchased the share at base price or market price and continue to be the shareholders would, therefore, constitute one class. The secured creditors/Class 'A' lenders who have charge over the immovable properties, irrespective of the terms of the loan agreement would be taken to be secured creditors and would constitute a different class. People who have advanced loan on hypothecation of the goods, would be treated as a Class with another lenders.

51. In the said matter, the Division Bench of this Court observed as under:

> *“... what is the primary importance for the purpose of constituting a class requiring a separate meeting thereof, is different treatment given to a group under the proposed scheme and no separate classification is required until a group is treated differently under the scheme. ..... The term of 'any interest treated differently under the scheme' is important. The fact that the shareholders/members of the same*

class, offered the same terms under the scheme perceive their interest differently or consider that their interest may be affected differently from others because of their interrelationship of their interests other than as shareholder simpliciter, cannot sustain their claim to constitute a class distinct from others. Such interest is to be taken care of by way of expressing their views and voting during the course of the meeting. If that were not so, all interests would be identical and if anybody has any interest apart from being treated differently under the scheme, likely to be affected in different manner because of the personal circumstance of the holder of shares or creditor, as the case may be, on account of consequences of the scheme but not on account of the terms of treatment under the scheme, would lead to the whole provisions being unworkable inasmuch as every person claiming his interest to be adversely affected by the proposed scheme on that account will have to be treated differently resulting in classification of groups having identical interest and identical response to the scheme.

The contention of the objectors is that their interest is not similar to that of other secured creditors, particularly ICICI, and on that basis the objectors contended that the foreign currency lenders constitute a separate

class of secured creditors. It has to be appreciated that it is not because of the different treatment given to the objectors that they constitute a separate class of secured creditors, and it is not the say of the objectors that the terms offered to them under the scheme are different. There is no dissimilarity of interest vis-a-vis the scheme. As far as the objectors are concerned, all the secured creditors under the scheme are offered the same terms, but the objectors being foreign currency lenders perceive their interest differently or consider that their interest may be affected differently from other secured creditors because of their interrelationship particularly ICICI or their interest other than as secured creditors simpliciter but the same cannot entitle the objectors to sustain their claim of separate class distinct from other secured creditors. The inter se differences/disputes amongst some secured creditors cannot be the criterion for constituting a separate class of secured creditors in foreign currency. Personal conflict of interest of the objectors with ICICI would be totally foreign to the scope of class meeting convened by the company to consider the scheme."

52. The said judgement of the High Court was

approved by the Supreme Court in the matter of ***Miheer H. Mafatlal v. Mafatlal Industries Limited***, reported in ***87 Comp. Cases 792.*** The Supreme Court has observed as under:

> *"So far as the articles of association of respondent-company are concerned they also contemplate two classes of shareholders ..... No separate class of equity shareholders is contemplated either by the Act or by the articles of association of respondent-company. The appellant is admittedly an equity shareholder. Therefore, he would fall within the same class of equity shareholders whose meeting was convened by the orders of the company court. ..... Even though the Companies Act or the articles of association do not provide for such a class within the class of equity shareholders, in a given contingency it may be contended by a group of shareholders that because of their separate and conflicting interests vis-a-vis other equity shareholders with whom they formed a wider class, a separate meeting of such separately interested shareholders should have been convened. But such is not the case of the appellant. It is not his case that his interest as an equity shareholder in the respondent-company is in any way conflicting with the general interest of the equity shareholders as a class. Consequently, it*

could not be urged by him with any emphasis that the general body of equity shareholders acting as a class while considering the question of approval of the scheme was likely to take a decision which would adversely affect the commercial interest of the appellant as an equity shareholder. His personal conflict of interest with the director was totally foreign to the scope of class meeting which was convened to consider the Scheme in question as we have seen earlier while considering earlier points for determination. It is also to be kept in view that the appellant could have urged with some justification his contention for convening a separate meeting representing for him and his group of dissenting equity shareholders if it was his case that the scheme of compromise and arrangement as offered to him and his group was in any way different from the scheme of compromise and arrangement offered to other equity shareholders who also belonged to the same class in the wider sense of the term. On the express language of Section 391 (1) it becomes clear that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or class of them has to be convened. This clearly presupposes that if the scheme of arrangement or compromise is offered to the members as a class and no separate scheme is offered to any sub-class of members which has

a separate interest and a separate scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive. ..... Consequently when one and the same scheme is offered to the entire class of equity shareholders for their consideration and when the commercial interest of the appellant so far as the scheme is concerned is in common with other equity shareholders he would have a common cause with them either to accept or to reject the scheme from commercial point of view. Consequently, there was no occasion for convening a separate class meeting of the minority equity shareholders represented by the appellant and his group as tried to be suggested."

52.1 In this connection, the Supreme Court referred to what the learned author Palmer in his treatise on Company Law, 24th Edition, has to say on,

"What constitutes a class:
The court does not itself consider at this point what classes of creditors or members should be made parties to the scheme. "

52.2 The Supreme Court then proceeds to observe that:

"It is, therefore, obvious that unless a

separate and different type of scheme of compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such sub-class of the main class of members or creditors is required to be convened."

53. In the case of ***D.A. Swamy & Ors. v. India Meters Ltd., [1994] 79 Comp Cas 27,*** the Division Bench of Madras High Court has observed that:

"*Broadly speaking, a group of persons would constitute one class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. The group styled as a class should, ordinarily, be homogeneous and must have commonality of interest and the compromise offered to them must be identical.*"

53.1 In the above case before the Madras High Court, at the meeting of the unsecured creditors of the company to consider a proposed scheme for revival of the company, certain motions for amendments sought to the scheme were not carried for want of majority and the scheme was approved as proposed. The learned single Judge accorded sanction to the scheme in the interest of the employees, rejecting the objections

of certain unsecured creditors, *inter alia*, that the scheme proposed differential treatment to fixed depositors and other unsecured creditors such as loan and hundi and suppliers, and that proxies obtained by those attending the meeting had been misused (including by the chairman, a director of the company) to defeat the motion for amendments. As far as the principle enunciated is concerned, there cannot be any disagreement with the same.

*53.2 In the case of **Osiris Insurance Ltd**., In re, Chancery Division (Companies Court), in [1999] 1 BCLC 182, 188, the case of Sovereign Life Assurance Co. v. Dodd [1892] 2 QB 573 (CA) has been referred to, reproducing the following observations from page 583 thereof:*

> *"The word 'class' is vague, and to find out what is meant by it we must look at the scope of section, which is a section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are so*

dissimilar as to make it impossible for them to consult together with a view to their common interest."

As far as the company is concerned all secured creditors offshore lenders as well as onshore lenders have been treated alike and no distinction is kept by the company withing/amongst the secured creditors. It is not the say of the objectors that this group of secured creditors have been treated differently from other secured creditors by the company. The grievance is otherwise. Identical/same terms of compromise have been offered to all the secured creditors. There cannot be any preferential treatment to some unsecured creditors and the scheme cannot give any special treatment to some creditors. Simply because some of the secured creditors have some dispute between them or have been fighting litigation inter se can be no ground for treating litigating secured creditors differently from the body of secured creditors. There cannot be a class within the class and the class has to be of one type of creditors, namely, secured creditors, unsecured creditors and working capital lenders as all the secured creditors have similar rights in the company. As far as commonality or conflict of interest is concerned all the secured creditors have a common interest of securing their dues in proportion to the amount lent and the terms or

conditions thereof. It is not the say of the objectors that their rights are dissimilar to the rights of supporting secured creditors. As far as the body of secured creditors is concerned, there can be an effective consultation as far as their dues/interest/rights against the company under the scheme are concerned. It is not the say of the objectors that in the meeting of July 13, 2001, they were not allowed to participate in the proceedings of the meeting nor any secured creditor including the onshore lenders prevented them to have their say in the meeting. The class of creditors constituted, namely, secured creditors cannot be regarded as a heterogeneous group having nothing in common or want of the commonality of interest or the objectors have conflict of interest vis-a-vis the scheme with other secured creditors or that the class was formed to ensure that the rights and interest of some of the secured creditors (objectors) are confiscated.

It will be seen from the above discussion that all the secured creditors, including foreign currency lenders who were constituted as one class and called at the meeting had the commonality of interest and their rights are not so dissimilar as to make it impossible for them to consult together with a view to have their

common interest. The nature of the proposals embodied in the scheme apply equally to all the secured creditors, domestic currency lenders as well as foreign currency lenders and the same terms were offered to the entire body of secured creditors under the scheme. It is not suggested from the scheme offered that the interest of the secured creditors is in any manner conflicting or there is no commonality of interest vis-a-vis the company and the objectors form a homogeneous group along with other secured creditors and the class of secured creditors constituted cannot be regarded as heterogeneous.

In my opinion, the objectors would not be entitled to be treated as a different class of secured creditors, a class within the class, as there is no conflict of commercial interest between objectors and other secured creditors, especially when the same scheme with the same terms has been offered to all the secured creditors and there is no distinction made in the scheme between the objectors and other secured creditors."

54. The petitioners are also relying upon a judgement of the English Court in the case of ***Re Osiris Insurance Limited*** reported in Butterworths Company Law Cases [1999] 1 B.C.L.C. 182. In the said

matter, an argument was raised before the Chancery Division (Companies Court), which was as under:

> *"The applicant applied for an order under s.425 of the Companies Act, 1985 sanctioning a scheme of arrangement. The company carried on two types of insurance business, London Market business and Personal Lines business. From September 1992 the company ceased to write London Market business. On 3rd September, 1993, the company transferred its Personal Lines business to another company. From that date the company had thus been in run-off. The Personal Lines policies were all claims made policies. It appeared very unlikely that there could be any new valid claims on the Personal Lines policies. The London Market policies did not involve any long tail risks. Any claims in respect of such policies were likely to have been already made. The quantum of the company's anticipated liabilities was very small compared to the quantum of its assets. It was anticipated that the run-off would take several years to complete. All policyholders present in person or by proxy at the statutory meeting convened to consider the scheme voted in favour of the scheme. Although the number of those who voted was small compared to the number of those entitled to vote the value of the claims held by those who voted represented a substantial portion of those entitled to vote."*

The Chancery Division held as under:

"(1) The meeting was validly held because there was only one class of creditors. Whilst those summoned to attend the meeting had different types of insurance, given the nature of the proposed scheme it could not be said that their interests were different or conflicted with each other.

(2) The court must not act simply as a rubber stamp to approve the scheme. The court must ask whether the scheme was such that an intelligent and honest man in the position of one of the scheme creditors or potential scheme creditors could not reasonably have approved it or whether it contains some other blot.

(3) Notwithstanding some disadvantages with the scheme, given the relative benefits which the scheme conferred on scheme claimants compared with their position in the absence of the scheme, the fact that the meeting resulted in a unanimous and significant vote in favour of the scheme, and the care that had been taken to inform fully all former policyholders of the scheme, the scheme was approved, subject to the giving of two undertakings to cover certain possible lacunae."

54.1 From the observations made by the Chancery Division, it would be clear that the meeting was validly held because there was only one class of creditors. Whilst those summoned to attend the meeting had different types of insurances, given the nature of the proposed scheme, it could not be said that their interests were different or conflicted with each other. From the said judgement it would also be clear that if the scheme is beneficial to all concerned, then, such a scheme should be accepted.

55. In the matter of ***The Hawk Insurance Company Limited***, the Supreme Court of Judicature, Court of Appeal [Civil Division] observed after taking into consideration Section 425 of the Companies Act, 1985 that when an application is made to the Court under Section 425(1) of the Act for an order that the meeting or meetings be summoned, at that stage, a decision needs to be taken as to whether or not summon more than one meeting and if yes, who should be summoned to which meeting. The scheme proposals are put to the meeting or the meetings held in accordance with the orders of the Court and if are

approved by the requisite majority in number and value, all those present and voting in person or by proxy and thereafter, such approval is to be reported to the Court, but, it would not necessarily follow in every case that the treatment under the scheme of vested and contingent rights, or the rights under matured and current policies will be so dissimilar that the holders of those rights must be regarded as persons in different classes in the context of the question “with whom is the compromise or arrangement made”. According to the Court, in each case, the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (2) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied. It is in the light of that analysis that the test formulated by the Lord Justice Bowen in order to determine which creditors fall into a separate class – that is to say, that a class “must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common

interest".

55.1 From this judgement, it would also appear that the meaning of the word 'class' was appreciated in light of a judgement of Justice Bowen LJ in ***Sovereign Life Assurance Company vs. Dodd***, ***[1892] 2 QB 537 at 583***, as under:

> *"The word 'class' is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."*

56. In view of the authoritative pronouncements of this Court, the Supreme Court and other Courts and in view of the facts which are floating on the surface of the records, I must hold that the rights of the creditors are not so dissimilar as to make it impossible for them to consult together with a view

to their common interest. I must hold that a broad view should be taken of what constitutes a class of creditors.

57. I must also hold that there is no conflict of interest and there are no conflicting interest between ARCIL and other lenders, specially, the objectors. Each of them being a lender has common interest of recovering the dues from Core as much as and as early as possible so as to give them best in the returns. If the petition for compromise/demerger is not allowed and the scheme is rejected, then, the property would remain in possession of Core and in case, a petition is taken for winding up, then, all the properties would come in the hands of the Official Liquidator and ultimately, the same would be sold. After such property is sold, the claim of the workmen and the secured creditors will have to be taken up for consideration and each of them would be entitled to distribute the sale proceeds on *pari passu* basis. If at that point of time, ARCIL would be entitled to the entire amount of debt, which it had purchased, and the objectors to their individual

amounts would not be in a position to say to the Court that ARCIL would not be entitled to recover the purchased debt, then, at this stage, they cannot say that they are a class different because they have not compromised or have not agreed to the scheme of arrangement. As an assignee of Class 'A' lenders, ARCIL certainly was entitled to participate in the meeting of Class 'A' lenders and as an assignee, ARCIL was also entitled to participate in the meeting of Class 'B' lenders.

58. The judgement in the matter of ***Manek Chowk Mills Limited***, ***40 Company Cases 1819***, and the judgement in the matter of ***Arvind Mills Limited*** (*supra*), in fact, do not support the case and cause of the objectors. In the matter of ***Arvind Mills*** (*supra*), the High Court held that there was no conflict of commercial interest with the objectors and other secured creditors and if in this case, it is held that there is no conflict of commercial interest amongst the lenders, then, the judgement in the matter of ***Arvind Mills Limited*** (*supra*) would, in fact, help and support the case and cause of the

petitioners.

59. According to the objectors, the Scheme must fail because there were inadequacies in the explanatory statement and in particular, in relation to the following explanatory statements:

(i) ARCIL had proposed the scheme;

(ii) ARCIL had a special role including the recovery of its dues;

(iii) Possession of Sachana Unit has been handed over to Nirma; and,

(iv) There was an injunction order issued by the Debts Recovery Tribunal operating against Core prohibiting it from transferring its assets in the suit filed by HDFC Bank.

60. The afore-quoted Sections 393(1)(a) of the Act provides that the explanatory statement must contain: (a) terms of the scheme of the arrangement; and, (2) its effect and in particular, any material interest of the Director, Managing Director or Manager of the Company insofar as it is different from the interest of other persons.

61. According to the petitioners, the so-called inadequacies were factually known to every lender even before the meeting. Non-disclosure of a fact known to the noticee, according to the petitioners, can never to regarded as a failure because the purpose of such information is to supply necessary facts to the person, who are to attend the meeting enabling them to make correct vote. According to the petitioners, if the facts are fully known to somebody, then, reiteration of the same and non-supply of the said details would not amount to breach of the provisions of law.

62. In the matter of ***Mafatlal Industries*** (*supra*), the Supreme Court has observed as under:

> *"31. So far as this point is concerned it was vehemently contended by learned senior counsel, Shri Shanti Bhushan, that the explanatory statement placed for consideration of the meeting of equity shareholders was not a complete statement and relevant material indicating the interest of the Director of MIL, Shri Arvind*

Mafatlal, was not placed before the voters with the result that the majority vote supporting the scheme got vitiated. The explanatory statement which came to be circulated to the voters, namely, the equity shareholders of the transferee-company MIL alleged as under:

'It is proposed to amalgamate MFL with MIL so as to enable the carrying on the combined business more economically and advantageously. Amalgamation of both the companies would lead to substantial benefits in view of synergy of operations. The amalgamation of both the companies would give improved capital structure which would lend better flexibility in capital gearing which would enable the amalgamated company to raise required finance at better terms. A larger company would generate more confidence in the investors and with the persons dealing with the company and will afford access to resources easily and at lower costs. The amalgamation of MFL with MIL will pave the way for better, more efficient and economic control in the running operations and would lead to economy in the administrative and management cost, resulting in improving profitability. The amalgamated company will have a strong and large resource funds. The combined technological, managerial and financial

resources would enhance the capability of the amalgamated company to invest in larger and sophisticated projects to ensure rapid growth. The amalgamated company's Textiles Division with five operative units at its disposal will have flexibility in its operations.'

So far as the aforesaid explanatory statement is concerned it gives sufficient indication regarding the pliability and usefulness of the proposed Scheme of Amalgamation of transferor-company MFL with the transferee-company MIL. However, the special grievance of the appellant voiced by his learned counsel is to the effect that the real interest underlying the scheme of merger was that of the Director - Shri Arvind Mafatlal and his group who were at the helm of affairs of the transferee-company. The learned Senior Counsel, Shri Shanti Bhushan, in this connection submitted that under Section 393 (1)(a) of the Act, the company is enjoined to mention in the statement material interest of the Director, Shri Arvind Mafatlal, in the Scheme which is of a special nature as compared to the interest of other shareholders and it was also necessary to mention the effect of the compromise and arrangement on such special interest of Shri Arvind Mafatlal and as that was not mentioned in the explanatory statement along with which the

copy of the Scheme was circulated to the members the majority vote became vitiated. Now a mere look at Section 393(1)(a) shows that the special interest of the director which is required to be brought home to the voters must satisfy the following requirements of the Section before it can be treated to be a relevant special interest of the director which is required to be communicated to the voters:

1. The director's interest must be a special interest different from the interest of other members who are the voters at the meeting.

2. The compromise or arrangement which is put to vote must have an effect on such special interest of the director.

3. Such effect must be different from the effect of compromise and arrangement on similar interest of other persons who are called upon to vote at the meeting.

When we enquired of Shri Shanti Bhushan, learned Senior Counsel for the appellant as to which special interest, according to him, of Director, Arvind Mafatlal, was required to be communicated to the voters as per Section 393(1)(a), he stated that there was a pending litigation between the appellant on the one hand and Shri Arvind Mafatlal on the other in the Bombay High Court. That Shri Arvind Mafatlal had sought a declaration in a pending suit against the appellant that the latter was required to sell off his shareholding in the transferee-

company MIL to the plaintiff, Arvind Mafatlal, who was Director of MIL. In this very suit, the appellant had filed a counter-claim to the effect that Shri Arvind Mafatlal and his group were required to transfer their shareholding in the transferee-company in favour of the appellant as per the family arrangement of 1979. Shri Shanti Bhushan in this connection submitted that though the learned single Judge had taken the view that this type of special interest of Director, Arvind Mafatlal, was not relevant and germane to the requirement of Section 393(1)(a), the Division Bench in appeal had taken a contrary view and held that such a special interest was required to be communicated to the equity shareholders in their meeting as per the said provision. In this connection our attention was invited by Shri Shanti Bhushan to the observation of the Division Bench of the High Court at page 325 of the paper book wherein the Division Bench observed as under:

> *'Miheer H. Mafatlal was to get exclusive control to MIL to the exclusion of Arvind N. Mafatlal and his two brothers. Under the proposed family arrangement M. Fine was to be hived off from MIL and the control and management of M. Fine was to be held by Arvind N.Mafatlal and that of MIL was to be handed over to the objector, Miheer H. Mafatlal. This family arrangement has*

suffered rough weather. Suit No. 1010 of 1987 was filed by Arvind N. Mafatlal against Miheer H.Mafatlal and others before the Bombay High Court alleging that another agreement subsequent to the said family arrangement has come into existence under which Miheer H. Mafatlal and other brothers of Arvind had agreed to transfer all their holdings in MIL to A. N. Mafatlal, drawing a curtain on the family arrangement of 1979. Miheer H. Mafatlal has filed a counter-claim in that suit claiming enforcement of family arrangement of 1979. The said dispute and the outcome thereof will have a direct effect on the respective interests of the shares held by A. N. Mafatlal, Miheer H. Mafatlal and other members of the Mafatlal family, and trusts under them.'

He also invited our attention to the observations of the Division Bench at page 328 of the paper book to the effect that having considered the rival contentions and closely examined the scheme of Section 393, they were unable to sustain the conclusion that the facts about the interests under the alleged family arrangements and the effect of the proposed arrangement for amalgamation on such interests were not required to be disclosed under Section 393(1)(a).

32. In our view, the aforesaid observations of

the Division Bench are not quite apposite in the light of the proposed Scheme of Compromise and Arrangement which was sought to be got sanctioned by the Court. On the other hand, the learned single Judge was quite justified in taking the view that this type of interest which was of personal nature so far as Director, Arvind Mafatlal, on the one hand and the appellant on the other hand were concerned was not at all germane to the question relating to sanctioning of the Scheme of Compromise and Arrangement with which the Court was concerned. It is obvious that when a Scheme of Compromise and Arrangement which involves two companies, namely, the transferor-company and the transferee-company and their shareholders and creditors is on the anvil of scrutiny before the sanctioning Court, the Court has to see that the interest of the class of creditors or shareholders to whom the Scheme is offered for approval is in any way likely to be affected by the suppression of special interest of the director in connection with such a scheme which is on the anvil. Two independent bodies which are represented by their shareholders or creditors as a class, as the case may be, have to take commercial decisions strictly with a view to seeing that the concerned Scheme of Compromise and Arrangement is beneficial to the shareholders or creditors as a class vis-a-vis the company which is a corporate entity in so

far as company's relations with these class of creditors and shareholders are concerned. If the special interest which the director has is in any way likely to be affected by the Scheme and if non-disclosure of such an interest is likely to affect the voting pattern of the class of creditors or shareholders who are called upon to vote on the scheme, then only such special interest of the director is required to be communicated to the voters as per Section 393 (1)(a). We fail to appreciate how the personal family dispute between the appellant on the one hand and Arvind Mafatlal, Director of the transferee-company MIL on the other regarding the right to hold shares in the company can have any linkage or nexus with the Scheme of Amalgamation of these two companies which was put to vote before the equity shareholders. It is easy to visualize that if the suit filed by Arvind Mafatlal against the appellant succeeds and the appellant's counter-claim fails then all that would happen is that the appellant will have to sell his shareholding which is only 5% in the transferee-company to the plaintiff, Arvind Mafatlal. That has nothing to do with the equity shareholders as a class, which was called upon to decide whether the scheme of merging the transferor-company MFL with the transferee-company was for the benefit of the shareholders as a class. The equity shareholders of the transferee-company had to decide in their

commercial wisdom whether it is worthwhile to have a larger body of shareholders on account of the merger so that apart from the shareholdings of the transferee-company its objects would also get diversified and its field of operation would be enlarged with the prospects to hike in the dividend available to these shareholders after the economic and industrial activities of both the companies so amalgamated would get elongated and whether the value of their shares in such consolidated companies were likely to get a boost in the stock market. This was the commercial decision which the equity shareholders of the transferee-company had to take. For taking this informed decision they were least concerned whether 5% shareholding of the appellant in the company remained or did not remain with him in future. Consequently, if Arvind Mafatlal's suit ultimately succeeded before the Bombay High Court and the appellant lost in his counter-claim that would have no effect whatsoever on the informed decision which the equity shareholders were called upon to take while approving the scheme in question.

33. Conversely, if the appellant succeeded in his counter-claim and Director, Arvind Mafatlal, lost in his suit, then, all that would happen is that Arvind Mafatlal will have to transfer his shareholding and shareholding of his group in favour of the appellant so far as the

transferee-company is concerned. That future possibility would have no impact on the decision-making process which the equity shareholders of transferee-company had to undertake at this stage while approving the Scheme. Consequently such an eventuality was totally irrelevant for being brought to the notice of the equity shareholders before whom the scheme was put to vote. While deciding whether the transferor-company should be merged with the transferee-company and the transferee-company's economic and industrial activity should be permitted to be enlarged as a result of such merger the equity shareholders were least concerned whether the appellant would purchase in future the share of the present Director, Arvind Mafatlal, or vice versa. That was entirely their personal dispute which was still not adjudicated upon and its decision one way or the other had no impact on the pattern of voting of the equity shareholders of the respondent-company as a class of prudent businessmen and investors so far as the Scheme was concerned. The Scheme of Compromise and Arrangement which was put to vote was of such a nature that it had no impact or effect on the personal interest of the Director, Arvind Mafatlal, in connection with his present shareholding in the transferee-company. Consequently, it must be held that mention about such an interest was outside the statutory

requirements of Section 393(1)(a) as rightly held by the learned single Judge whose view was erroneously upset by the Division Bench. However, in any case we are in entire agreement with the subsequent reasoning of the Division Bench for approving the decision of the learned single Judge on this aspect, namely, that such non-disclosure of interest had no impact on the voting pattern adopted at the meeting by the equity shareholders who are called upon to approve the scheme. It may also be noted in this connection that the resolution of the equity shareholders approving the Scheme of Amalgamation was passed with overwhelming majority by members including through proxies, present and voting. It projected the following picture:

	In favour	Against	Total
(i) No. of Members	5,298	143	5,441
(ii) No. of valid votes	19,36,964	86,061	20,23,025

From the pattern of voting it became apparent that out of 100% of the share capital 75.75 per cent in value participated of which 95.75 per cent voted in favour of the proposed scheme. Out of 95.75 per cent of the votes in value, a paltry 8.43 per cent votes had been attributed to Arvind Mafatal group consisting of

individuals and trust. 39.45 per cent were the votes attributable to financial institutions which can be said to have no interest other than their own interests as men of business in considering the proposed Scheme. Over 23 per cent votes have been attributed to public limited companies or private limited companies which held the shares of MIL and in which Arvind Mafatlal was also alleged to have interests. Thus, non-mentioning of the private dispute between Arvind Mafatlal and the objector in connection with the holding of shares in the transferee-company had in fact no impact on the voting pattern of equity shareholders including the financial institutions which had nothing to do with this personal feud between the warring groups. Consequently, the non-mentioning of the pending dispute between the appellant on the one hand and Arvind Mafatlal on the other which was pending adjudication in the Bombay High Court had in fact no impact whatsoever on the result of the voting undertaken by the equity shareholders in their class meeting. Thus, the requisite statutory majority of votes approving the scheme could not have been adversely affected by the non-mentioning of this pending litigation in the explanatory note even assuming that the Division Bench was right in holding that it was required to be informed to the voters as per the requirements of Section 393(1)(a). In either view of the matter, therefore,

the non-mentioning of the pending litigation between the Director of the transferee-company, Arvind Mafatlal, on the one hand and the appellant on the other, had no vitiating effect on the majority decision of the equity shareholders who approved the Scheme with overwhelming majority of 95.75 per cent of votes and when the dissenting vote on behalf of the appellant's group was in microscopic minority of less than 5%. It is also pertinent to note in this connection that the appellant who being a party to the civil litigation before the Bombay High Court and who was very much keen to get more share holding in transferee-company and who had already filed his counter-claim for enforcing the family arrangement of 1979, had not thought it fit to remain present in the meeting of the equity shareholders and on the contrary he got himself represented through proxy who had no right to speak. Thus, in substance the appellant himself never thought that information about the pendency of the litigation between Arvind Mafatlal, Director of the respondent-company and himself was so important that it was required to be brought to the voters' notice even though he had opportunity to do so by remaining personally present in the meeting for that purpose. It, therefore, clearly appears to be an afterthought when he put forward such an objection for the sake of it at the time of opposing the Scheme

which was put for sanction of the Court.

34. It may also be kept in view that the explanatory statement in no way emphasised that it is the management of the transferee-company by Shri Arvind Mafatlal which is going to be better monitored and managed by him after the merger in question. In other words management of the company is not at all a germane consideration for the scheme. Consequently, whether the management remains with Arvind Mafatlal or in future may get changed and go in the hands of the appellant is not a consideration which has any linkage or nexus with the Scheme. Consequently, the interest of Arvind Mafatlal in the shareholding or likely future impact thereon by the litigation was de hors the Scheme in question and was not required to be placed before the voters. The first point for determination is, therefore, answered in the negative."

63. According to the petitioners, in relation to the objections of non-disclosure levelled against ARCIL, it is only required to be said that it is not a Director or Managing Director or Manager of Core. It is a lender and it has rights of a lender and under the circumstances, the price at which it

acquired the right is relevant. The petitioners submits that ARCIL has not proposed the scheme, it is merely facilitating the scheme. Under the circumstances, the so-called non-disclosure of the role of ARCIL cannot be found to be illegal under Section 393(1)(a) of the Act.

64. The petitioners also submit that under the Scheme no special treatment was given to ARCIL and ARCIL was treated like any other lender. According to them, the company had supplied all details at the time of meeting and if ARCIL had not supplied the details, in their meeting, which was conducted prior to the meeting ordered by the Court, no wrong can be found with anybody.

65. After going through the records, I must hold that ARCIL was not required to supply the alleged details. ARCIL, being a lender like all other lenders, itself was entitled to the details, as required under the law. The objector cannot assert that it was the duty of ARCIL to supply the details, especially, when the allegation of ARCIL is that the

lenders, especially, the objectors were possessed of everything and had fullest knowledge of everything.

66. After the possession of the property was taken over by ARCIL under some terms or agreement, the possession was handed over to Nirma. Handing over of possession to Nirma, in fact, would not run contrary to the provisions of the SARFAESI Act because the law provides that the person, who had taken the possession under the Act would be entitled to manage the property and would also be entitled to deal with the property so that best use of the property is taken. In the present case, the objectors do not say that handing over of possession of the property to Nirma had caused any prejudice to them or was to create special favours in favour of Nirma. The injunction, non-reporting of which is made an issue, was obtained by HDFC against Core. Once exercising the statutory powers, ARCIL had taken the possession, then, no complaint can be made to the Debts Recovery Tribunal or Civil Court that Core have violated the terms of injunction. The injunction was, not to hand over the possession or transfer the property.

Undisputedly, Core did not transfer the property nor did it hand over the possession of the property to a third party. In fact, the possession was taken from them by ARCIL under its statutory rights. Mention or non-mention of the injunction in any case would not have benefited the case and cause of the objectors. From the records, it would also be clear that the order passed by this Court on 28th October, 2005, directing convening of the meeting, does refer to this order and the said order of the Court was placed in the meeting of the lenders. According to the petitioners, the order of the Court was made known to everybody and the same was disclosed in the meeting of the lenders. What the petitioners propose to contend is that if the injunction and its effect was not immediately informed, then too, at least, people knew about it and after going through the orders passed by this Court did not raise any objection that the fact was not brought to their notice in the explanatory statement.

67. For the reasons stated above, I am unable to hold that the scheme must fail because the

explanatory statement did not give correct details and suffered with the vice of inadequacies.

68. The next question for consideration is that whether the Scheme is unfair to treatment of Bank Guarantee and amount payable to HDFC Bank in relation to the Bank Guarantee can become subject matter of the Scheme proceedings. The objections of HDFC is that certain amounts, which have been paid by HDFC Bank under the Bank Guarantee, have not been reflected in the balance sheet of Core and the same cannot be subject matter of these proceedings. The objection further says that in view of non-disclosure of the Bank Guarantee amount, the balance sheet does not disclose “true and fair view” of the accounts of the company and as such, the accounts of the company are not reliable and in view of the glaring facts, there can be no compromise.

69. It is also the case that the said debt is settled between Core and/or Nirma with the Customs Department or on a later date, the export obligations are fulfilled, Nirma would be entitled to realise the

full amount from the Customs Department and this, in fact, would cause injustice to HDFC. The petitioners have submitted that there is no dispute that HDFC Bank has paid money to the Customs Department on account of encashment of the Bank Guarantee. Once the amount is paid by HDFC for and on behalf of Core, then, HDFC Bank would be entitled to recover it from Core and under the circumstances, HDFC would become a lender of money. According to them, when the Scheme is proposed for restructuring of debts of Core payable to every lender, then, there is no reason to assume that such liability of the Bank Guarantee has to be ignored. They also submitted that accounts do not create liability, but, merely record the same. According to them, if in the accounts, the liability is disclosed as contingent liability, the same cannot mean that liability which has actually arisen can be ignored. They also submitted that the right to get back the Bank Guarantee amount from Core, Customs Department, is based on a speculation because it is not known to anybody that whether the export obligations would be fulfilled or not. They also submitted that as all the debts are required to be

settled under the Scheme of Compromise and Arrangement and certain benefits flow in favour of Nirma, then, future reliefs would not have a bearing on the settlement, which is to be arrived at today. It is also the submission that Nirma agrees to take Sachana Unit with all its assets and liabilities and as on today, one cannot ascertain worth of the assets and/or quantum of liabilities. According to them, the compromise is a package deal for demerger of the assets and liabilities as exist today and to what extent the assets would crsystallise or liabilities would prop up at a future date would be in the realm of speculation and this cannot, therefore, invalidate the Scheme proceedings. According to them, under the Scheme of Demerger, Sachana undertaking with all liabilities and its assets would stand vested into Nirma. According to them, if Nirma is agreeable to take over Sachana undertaking under the Scheme of Demerger, then, Nirma would be entitled to all the benefits and would also suffer the liabilities.

70. In the opinion of this Court, the argument of the petitioners must prevail. Once it is held that

on payment of the amount under the Bank Guarantee, HDFC Bank had become the lender of money and under the Scheme of Demerger, all assets and liabilities of Sachana Unit would vest in Nirma, then, there is no scope to say that HDFC, though a lender, would be entitled to say that particular amount be kept outside the Scheme. It would absolutely be correct to say that the compromise and demerger scheme is a package deal and when a party is agreeable to the compromise in a package deal, then, such party would be entitled to all the benefits flowing from the Scheme. It is also true to say that the statutory liabilities and other liabilities, known or unknown, real or contingent, will have to be suffered by Nirma and at this stage, it is not possible to define with reasonable certainty and exact calculation as to what would be the sum total of such liabilities. As on today, the amount under the Bank Guarantee has been paid for or on behalf of Core and if this amount ultimately is to be refunded, then, the benefit must go to the party entitled to it under the Scheme. It would also be correct to say that if Nirma fulfills the export obligations, then, their right to recover

the money from the Customs Department would be a right flowing from the Scheme and in fact, the amount to be paid to Nirma would not be an amount, which is to go back to HDFC Bank. In case, there is no scheme and Core fulfills the export obligations, then, Core would be entitled to the refund and HDFC, even at that time, cannot say that the money should be paid to them directly. Under the circumstances, the objection raised by HDFC does not merit.

71. The objectors have further submitted that in absence of special resolution for reduction of the share capital, the Scheme would be absolutely invalid. According to the objectors, in absence of compliance of the formalities required under Sections 100 to 104 of the Act, permitting the company to reduce its share capital, the Scheme, which envisages reduction of capital of Core, is not permissible. The objectors have also referred to Section 189 of the Act which defines “special resolution” wherein an approval of 3/4th of the members in the voting at the meeting is required. The petitioners submit that while allowing Core to convene the meeting, this

Court specifically ordered that the requirements of provisions of Section 101(2) of the Act, read with Rules 48 to 65 of the Companies (Court) Rules, 1954 be dispensed with. According to them, the order was passed after hearing HDFC Bank and under the circumstances, the Bank cannot be allowed to raise this objection. The petitioners submit that the Scheme proceedings are single window clearance and while passing the order in the Scheme proceedings, this Court can sanction reduction of the share capital, which can be part of the very Scheme and it would not be necessary to convene a separate meeting for considering such reduction.

72. In the matter of ***Manek Chowk and Ahmedabad Manufacturing Company Limited***, ***40 Comp.Cases 819***, this Court has held as under:

> *"That takes me to the last attack under the head 'reorganisation of share capital', namely, that the scheme envisages reduction of share capital and that cannot be done without following the procedure as prescribed in section 100 onwards of the Companies Act, even if it be done as part of the scheme. I have already pointed out above that reorganisation of the share capital can be*

carried out as a part of a scheme of compromise and arrangement under section 391 without following the whole gamut of the procedure prescribed for the same in other parts of the Companies Act. However, rule 85 makes a special departure in case of reduction of share capital when it is to be carried out as part of the scheme of compromise and arrangement. Rule 85 which I have already referred to earlier, provides that when reduction of share capital is to be effected as part of a scheme of compromise and arrangement, procedure prescribed for the same in the Companies Act and Rules should be carried out as stated earlier. This provision is made for very good reasons. It unmistakably indicates that reorganisation of share capital can be brought about as part of the scheme of compromise and arrangement. But even if it is to be done as part of the scheme of compromise and arrangement this special provision in rule 85 enjoins a duty to carry out the procedure contained in section 100 onwards of the Companies Act. Ordinarily, reduction of share capital affects members of the company and it can be brought about by a compromise or arrangement between the company and its members ignoring the creditors. Now, if reduction of share capital involves repayment of a part of paid up capital or extinguish or reduce the liability on any of the shares in respect of unpaid share capital it would adversely affect

the creditors. Yet the creditors would have no voice in the matter. If the procedure as provided in section 100 onwards has got to be carried out the court could not sanction reduction of share capital unless the creditors are heard and provision is made for the creditors who object to the reduction. However, if the reduction of share capital does not involve either diminution of liability in respect of unpaid share capital or payment to any shareholder of any paid up capital, the court can sanction the same without reference to the creditors. The creditors in such a case would not even be entitled to object to the proposed reduction as provided in section 102. In the instant case, admittedly, the reduction of share capital is by way of cancellation of share capital which is lost or is unrepresented by available assets. In such a case, creditors, even in a reduction simpliciter, are not entitled to object and it makes no difference if reduction is brought about by following the procedure prescribed in section 100 onwards or by way of a scheme of compromise and arrangement. Thus, if it can be done in a given set of circumstances as part of a scheme of compromise and arrangement, it has been properly done in this case and while sanctioning the scheme ipso facto the reduction of share capital ought to be confirmed.

I am however prepared to proceed on the assumption that even if the proposed scheme of compromise and arrangement envisages reduction of share capital which is lost or is unrepresented by available assets the same cannot be done except by following the procedure specifically prescribed in section 100 onwards of the Companies Act. It is, therefore, necessary to find out whether the procedure therein prescribed has been carried out by the company or not. There is nothing objectionable in the company proposing a scheme of compromise and arrangement simultaneously proposing reduction of share capital and both can be considered and approved simultaneously. This is borne out by the observations in In re Tata Iron and Steel Co. Ltd. In that case it was contended that the scheme which effects alteration in the memorandum or articles of association without proceedings having been taken under the Act in the manner laid down by the Act for the purpose of effecting such an alteration cannot be sanctioned unless separate proceedings are taken for alteration in the memorandum and articles of association. Negativing this contention, it was held that where the Act lays down express procedure for altering the memorandum it is doubtful whether it is not necessary to follow that procedure before applying for sanction under section 120, but where that is not so, the court can under section 120 sanction the scheme

which alters the memorandum. In In re Katni Cement and Industrial Co. Ltd., a scheme of amalgamation was proposed between the said company and merger of all the cement companies to be named as Associated Cement Companies Ltd. Before this merger could be made it became necessary to reorganise the share capital and alter the rights conferred by the memorandum of association upon different classes of shareholders in the capital of the said company. This was proposed as a part of the scheme of amalgamation under section 153 of the Companies Act, 1913, which is pari materia with section 191 of the Companies Act, 1956. It is observed that the court under section 153 can sanction a scheme, even though it involves acts which, apart from such provisions, would be ultra vires the company; but this rule, is subject to the limitation that if the Companies Act contains express provision enabling the doing of any act in a particular way, the provisions of the enabling section, and not those of section 153, must be followed. Relying on this observation, it was urged that if there is provision for effecting reduction of share capital, it must be followed to the exclusion of section 391. Reference was also made to Bengal Bank Ltd. v. Suresh Chakravarthy, wherein it has been observed that a scheme involving reduction of capital must be carried out in accordance with the statutory provisions relating to reduction.

Reference was also made to In re Bharati Central Bank Ltd. wherein it has been observed as under:

> *'..... where the Act expressly prescribes a special procedure for reduction of capital, e.g., by section 55 and the several sections following it, a scheme involving a reduction of capital, such as the one now before me does, cannot be sanctioned unless the procedure for reduction of capital has also been followed. Form No.774 in Palmer's Company Precedents, 15th edition, Part I, page 1264, shows that the reduction of capital and scheme may be considered by the shareholders at one and the same meeting and separate meetings are not necessary and that the court may, by one and the same order, sanction a scheme in conjunction with reduction of capital, that is to say, under section 55 confirm the special resolution for reduction of capital, and, under section 153, sanction the scheme. If, however, the requirements of section 55 and other sections have not been complied with, the court may direct the application for sanction to stand over in order to enable the company to advertise the petition and otherwise comply with the requirements of the Act for reduction of capital, as was alone In re Cooper.'*

It does appear well settled that where the scheme of compromise and arrangement comprises

within its ambit reduction of share capital, the procedure for reduction must be gone through but if it is shown that the procedure prescribed under section 100 onwards has been carried out simultaneously while submitting the scheme for approval of the creditors and members, the court can, while sanctioning the scheme, sanction reduction of share capital. The important thing to find out would be whether the procedure for reduction of share capital wherever it is mandatory has been strictly carried out and wherever it is directory has been substantially complied with.

Before one can find out as to what exact procedure should be followed for effecting reduction in share capital in a given case, it must be found out how the company proposes to reduce the share capital. The share capital of a company can be reduced in three distinct ways as set out in section 100. The company for effecting reduction of share capital may extinguish or reduce the liability of any of its shares in respect of share capital not paid up; either with or without extinguishing or reducing liability on any of its shares cancel any paid up share capital which is lost, or is unrepresented by available assets; or with or without extinguishing or reducing liability on any of its shares, pay off the paid-up share capital which is in excess of the wants of the company. The reduction of the share capital can

be effected by a special resolution at a general meeting which must be sanctioned by the court. Section 101 provides that, if the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or payment to any shareholder of any paid up share capital, the provisions therein prescribed shall have effect, subject to the powers of the court having regard to the special circumstances in the case to direct that the provisions of sub.section (2) shall not apply as regards any class or classes of creditors.

In the present case the share capital is not reduced by extinguishing or reducing the liability of any of the shares of the company, in respect of the capital not paid up or by paying off any paid up share capital which is in excess of the wants of the company. The reduction is effected by cancelling the paid up capital which is lost or is unrepresented by available assets. When the capital is reduced by cancelling any paid up share capital which is lost or is otherwise unrepresented by available assets, it is not mandatory to follow the procedure prescribed in sub-section (2) of section 101 unless the court so directs. The procedure prescribed under sub-section (2) of section 101 requires service of the notice of the petition filed for confirming the reduction

of capital on every creditor of the company affected by reduction and who is entitled to object to the reduction. The procedure goes so far as to make provision by order of the Court for payment to the dissenting creditors. That procedure is mandatory, where the proposed reduction involves diminution of liability in respect of unpaid share capital or payment to any shareholder of any paid up share capital. That is not the case here. It is common ground that reduction is by way of cancellation of the paid up share capital which is lost or is unrepresented by available assets. Unless, therefore, the court otherwise directs, the procedure prescribed under sub-section (2) of section 101 is not mandatory in this case. Therefore, in order to effect reduction of share capital by way of cancellation of paid up share capital which is lost or is unrepresented by the available assets, the company will have to adopt a special resolution to be styled as resolution for reducing the share capital in a general meeting and then apply for confirmation of the reduction of share capital. For the reasons hereinbefore mentioned, I will hold that the company has given notice of 21 days' duration and the notice convening the meeting served upon the members disclosed the resolution that, while approving the scheme, the members should approve the reduction of share capital. Resolution approving the scheme has been passed with

statutory majority. The only question would be whether the intention to move the resolution as special resolution in a general meeting to be attended by the ordinary shareholders and preference shareholders is set out in the notice convening the meeting or meetings. The reasons set out above while considering the case of issue and allotment of further share and the provision contained in section 81(1) and 81(1A) would mutatis mutandis apply here. I would, therefore, hold that the members of the company in a general meeting approved reduction of share capital by a special resolution which has been passed by statutory majority and while approving the scheme the members simultaneously approved reduction of share capital by a special resolution. Therefore, the procedure prescribed in sections 100 and 101 has been carried out by the company and section 102 would not be attracted and therefore while sanctioning the scheme the court can sanction the reduction of share capital. I would, therefore, hold that the mandatory procedure prescribed for reduction of the share capital has been strictly complied with. Therefore, the company has carried out the procedure prescribed for reduction of share capital and the same can be simultaneously confirmed while sanctioning the scheme which I hereby propose to do."

72.1 From the observations made by this Court it

would be clear that the members of the company in a general meeting can approve reduction of the share capital by a special resolution if the same is passed by statutory majority and while approving the Scheme, the members simultaneously approve reduction of the share capital by a special resolution. It has to be held that the procedure prescribed in Sections 100 to 101 has been carried by the company and Section 102 would not be attracted. In view of the settled law, the objection raised by the objector does not survive.

73. So far as the objection of the objector that the Scheme is invalid because it amounts to fraud on the revenue because the Scheme provides for benefit of set off with carry forward losses and depreciation of Sachana Undertaking of Core in the hands of Nirma is concerned, it is to be seen that Section 72A(4) of the Income Tax Act, 1961 itself provides that such carried forward losses or unabsorbed depreciation of demerged undertaking would be carried forward and set off in the hands of the Resulting Company. If the statutory benefit is available to Nirma and they are

entitled to take advantage of such set off, then, the objectors cannot be allowed to say that the Scheme would be a fraud on revenue. It would be correct to say that what is permissible under the law can never be regarded as contrary to the public policy or fraud on revenue.

74. In relation to the objection regarding the share exchange ratio, the petitioners have submitted that none of the objectors-Banks are shareholders of Core or Nirma and therefore, they are not entitled to raise such objection. From the submissions made by the petitioners, it would clearly appear that the exchange ratio is fixed on the basis of the report of M/s. RSM & Company, Chartered Accountants of Mumbai. According to them, this report was placed at the meeting of the shareholders and the lenders and no objection whatsoever was raised in any of the meetings as to fixation of the said ratio. In the opinion of this Court, if by allotment of shares of Nirma to the shareholders of Core, the said shareholders are to be benefited, then, the present objectors cannot have any objection. In case of sale

of the assets and winding up of the company, the shareholders of Core would not get anything. If under the Scheme, such shareholders are to receive some benefits, then, conferral of such benefits upon such shareholders is not going to affect the rights of the objectors. It is also to be noted that the shareholders of Core would continue to hold their shares and additional benefit would be conferred upon the shareholders of Core. Conferral of this benefit upon the shareholders will also have to be appreciated from the viewpoint of the shareholders, who are now to get something against nothing and that is persuading them to accept this scheme. In any case, the objectors are not entitled to challenge the Scheme on the ground of share exchange ratio.

75. In the matter of ***Miheer Mafatlal*** (*supra*), the Apex Court had observed as under:

> *"…… It has also to be kept in view that which exchange ratio is better is in the realm of commercial decision of well informed equity shareholders. It is not for the Court to sit in appeal over this value judgement of equity shareholders who are supposed to be men of the world and reasonable persons who know their own*

benefit and interest underlying any proposed scheme. With open eyes they have okayed this ratio and the entire Scheme. 40% of the majority shareholders were financial institutions who were supposed to be well versed on the aspect of valuation of shares. They had no objection to the exchange of two shares of the transferee-Company for five shares of the transferor-Company. As stated earlier, it was a sort of a package duly considering all imponderables and implicit factors which the shareholders had to keep in view for deciding whether to approve the Scheme of Amalgamation or not. The exchange ratio was only one of the items. They thought it fit in their commercial wisdom to accept the Scheme as a whole along with the exchange ratio presumably in expectation of better profits in years to come when the amalgamated companies would operate and when there would be, according to the shareholders, better prospects of earning greater dividends. They willingly agreed to give in exchange two shares of the transferee-Company for five shares of the transferor-Company and made them available to the shareholders of the transferor-Company. The appellant was representing only 5% dissenting shareholders and his objection was almost a voice in the wilderness, which did not appeal to the majority of his brother shareholders. Shri Shanti Bhushan, learned Senior Counsel for the appellant, in this connection invited our

attention to the observation of the Division Bench in its judgement at page 375 wherein it has been observed that 'if one were to examine the exactitude of exchange ratio that may be offered fairly on the arithmetic scale by taking into consideration various details, there is some force in what were suggested by Mr. B.R. Shah on behalf of the appellant. However, keeping in view the scope of enquiry which the Court is required to undertake and with whose findings we are concerned, it will not be permissible for us in law to undertake this exercise in the facts and circumstances of the present case in absence of bona fides'. We fail to appreciate how this observation can be of any avail to the learned Senior Counsel for the appellant as all that the Court wanted to suggest was that even assuming that some other exchange ratio can be suggested to be a better one, it was for the equity shareholders who acted bona fide in the interest of their class as a whole to accept even a less favourable ratio considering other benefits that may offset such less favourable ratio once an amalgamation goes through. We wholly concur with this view. In this connection we may also refer to a decision of Maugham, J., in Hoare & Co., In re [1933] All ER Rep 105, wherein it was laid down that where statutory majority had accepted the offer the onus must rest on the applicants to satisfy the court that the price offered is

unfair. In this connection, the following pertinent observations were made by the learned Judge:

'The other conclusion I draw is this … the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of shareholders who are concerned. Accordingly, without expressing a final opinion on the matter, because, there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders, the scheme is unfair.'

We may also refer to a decision of the Madras High Court in Kamala Sugar Mills Ltd., In re [1984] 55 Comp Cas 308, dealing with an identical objection about the exchange ratio adopted in the scheme of compromise and arrangement. The Court observed as under:

'Once the exchange ratio of the shares of the transferee-company to be allotted to the shareholders of the transferor-company has been worked out by a recognised firm of chartered accountants who are experts in the field of valuation and if no mistake can be pointed out

in the said valuation, it is not for the court to substitute its exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders of the two companies or to say that the shareholders in their collective wisdom should not have accepted the said exchange ratio on the ground that it will be detrimental to their interest.'

These observations in our view represent the correct legal position on this aspect. .... "

75.1 From this settled proposition, it would clearly appear that once the exchange ratio of the shares of the transferee-Company to be allotted to the shareholders of the transferor-Company has been worked out by a recognised firm of Chartered Accountants, who are experts in the field of valuation and no mistake can be pointed out in the said valuation, it is not for the Court to substitute its exchange ratio. It would also be clear from this judgement that if the overwhelming majority of the shareholders of the two companies accept the share exchange ratio, then, it is not for the Court to substitute its own wisdom because the shareholders

otherwise were entitled not to accept the share exchange ratio.

76. The petitioners have submitted that there is no variation in the value of votes cast by ARCIL, Niya Finstock Pvt. Ltd. and Astramed Technologies Ltd. According to them, there is no variation between the vote of ARCIL as per the books of Core and as recognised in the meeting of the lenders. According to them, in response to the order made by this Court, ARCIL had filed two affidavits and has given value of different debts, being the value of the debts assigned on the date of assignment to it and the account books of Core, the value is taken as on cut off date, that is, 30th November, 2004. According to the books of Core, the principal value of debt is Rs.371.91 crores in relation to Class 'A' lenders, while according to ARCIL, the value of debt would be Rs.373.88 crores. The difference would be of Rs.1.97 crores only, which would be less than 0.6%. They also submitted in relation to Class 'B' lenders' vote that ARCIL voted in relation to State Bank of India only. According to them, irrespective of this discrepancy,

outcome of the meeting would not undergo any change. They also submitted that as a matter of fact, in the meeting of the lenders, ARCIL's vote was given the value as per the books of Core, which was less by Rs.1.97 crores and not by the value as claimed by ARCIL. They also submitted that so far as the value of the vote of Niya Finstock Pvt. Ltd. and Astramed Technologies Ltd. are concerned, the same are correct. According to them, even if their votes are completely ignored, the Scheme would stand carried with the statutory majority. They have submitted that even after exclusion of Niya Finstock Pvt. Ltd. and Astramed Technologies Limited, it would appear that 69 lenders out of 73 voted in favour of the Scheme, which amounts to 94.52% of the lenders present and voting and from the pattern of voting it would appear that 82.85% value of the debt voted in favour of the Scheme.

77. I am in complete agreement with the submissions made by the petitioners that inclusion or non-inclusion of vote of Niya Finstock Pvt. Ltd. and Astramed Technologies Ltd. would not have made any

difference in the voting pattern and would not have slashed the statutory majority in value from 75% or in number below 51%.

The objections raised by the objectors do not merit.

78. M/s. Alstom Projects (India) Ltd. has filed Company Application No.618 of 2006 submitting, *inter alia*, that it has supplied a power plant and is an unpaid seller and therefore, is entitled to return of the power plant. In the opinion of this Court, an unpaid seller would be an unsecured creditor. Such an unpaid seller or unsecured creditor, in the preset set of circumstances, would not be entitled to recover any money and even in case of winding up of the company if would not come in the first queue to receive the money, then, they cannot be allowed to say that they are entitled to return of the plant.

79. IDBI Bank has filed Company Application No.602 of 2006 for return of the power plant, which was purchased by Core from M/s.Alstom Projects

(India) Ltd. and sold to IDBI Bank. Their submission is that the said plant is not a part of the Scheme and though ARCIL has permitted them to take away their plant, Nirma is not permitting them to take away their plant.

80. The petitioners have submitted that this issue does not arise out of the Scheme proceedings. They do nowhere say that the power plant belongs to Core or is a part of the Scheme or has been transferred to Nirma. If the power plant does not belong to Core or is not being transferred in favour of Nirma, then, Nirma would not be entitled to retain its possession. True it is, that the Apex Court, in the matter of ***Nocil vs. Mafatlal Industries Limited*** [***AIR 2004 SC 3933***], has observed that such would be an issue beyond the scope of consideration in a matter relating to sanction of the Scheme, but, in the opinion of this Court, it must be observed in favour of IDBI that if Core or Nirma does not permit them to have the possession of their power plant, then, they would be entitled to take appropriate legal proceedings against Core and/or Nirma. At this

stage, I must advise Core and Nirma that if the property does not belong to them, then, they should not create unnecessary complications in the matter and should always act as honest business people, who do not grab property of others.

81. Taking into consideration the provisions of the Scheme, I hold that the Scheme deserves to be approved. It is, accordingly, approved. Company Petition No.10 of 2006 filed by Core is disposed of with the following directions:

(i) The modified composite Scheme of Arrangement referred to in paragraph 15 of the petition, which shall be an integral part of this order, stands sanctioned and it would be binding on all the equity shareholders, Class ‘A’ lenders and Class ‘B’ lenders of the petitioner-Company and on the petitioner–Company.

(ii) Within 30 days from the date of sealing of the order, the petitioner-Company shall serve a certified copy of the order sanctioning the

Scheme of Arrangement with the Registrar of Companies (Gujarat), Ahmedabad for registration and upon such certified copy of the order being so delivered, the Registrar of Companies (Gujarat), Ahmedabad shall consolidate all relevant files, documents, records, relating to the demerged Company maintained by him with the files, documents records of the Resulting Company.

81.1 Company Petition No.9 of 2006 is filed by Nirma is disposed of with the following directions:

(i) The modified composite Scheme of Arrangement referred to in paragraph-15 of the petition which shall be an integral part of this order is sanctioned and it would be binding on all equity and preference shareholders of the petitioner-Company and on the petitioner-Company.

(ii) Within 30 days from the date of sealing of the order, the petitioner-Company shall serve a certified copy of the order sanctioning the Scheme of Arrangement with the Registrar of

Companies (Gujarat), Ahmedabad for registration and upon such certified copy of the order being so delivered, the Registrar of Companies (Gujarat), Ahmedabad shall consolidate all relevant files, documents, records, relating to the demerged Company maintained by him with the files, documents records of the Resulting Company.

Both the petitions are accordingly disposed of. No costs.

[R.S.Garg, J.]

*kamlesh & Pirzada**